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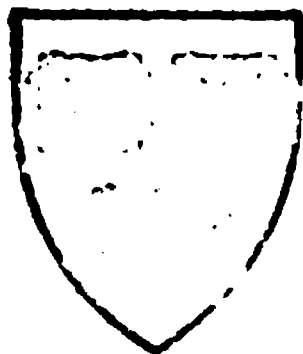
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**REPORTS**  
**OF**  
**CASES AT LAW AND IN EQUITY**  
**DETERMINED BY THE**  
**SUPREME COURT**  
**OF THE**  
**STATE OF IOWA**

---

**SEPTEMBER TERM, 1911, AND**  
**JANUARY TERM, 1912.**

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**BY**  
**W. W. CORNWALL**  
**REPORTER**

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**VOLUME XXXVI.**

**BEING VOLUME CLIII OF THE SERIES.**

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**CHICAGO, ILLINOIS:**  
**T. H. FLOOD & CO., PUBLISHERS,**  
**1912**

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*Council Bluffs*—S. B. SNYDER.

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*Oelwein*—EUGENE J. O'CONNOR.

*Perry*—JOHN SHORTLEY.

*Shenandoah*—GEO. H. CASTLE.

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SCOTT M. LADD, O'Brien County.

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W. W. CORNWALL, *Reporter*, Clay County.

\* Chief Justice until January 1, 1912. Succeeded by Justice McClain, who became Chief Justice in rotation.

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OF  
CASES AT LAW AND IN EQUITY  
DETERMINED BY THE  
**SUPREME COURT**  
OF THE  
STATE OF IOWA  
AT  
DES MOINES, SEPTEMBER TERM, 1911,  
AND JANUARY TERM, 1912.  
AND IN THE SIXTY-FIFTH YEAR OF THE STATE.

---

PINE BROTHERS v. THE CHICAGO, BURLINGTON & QUINCY  
RAILROAD COMPANY, Appellant.

**Railroads:** SHIPMENT OF LIVE STOCK: NEGLIGENT DELAY. A railway company is not required to attach a freight car carrying live stock to a passenger train to hasten its delivery; and where it transports the same by its usual freight trains on schedule time and there is no evidence that there were faster freight trains by which the destination could have been sooner reached, it is not liable for the death of an animal, the result of sickness, while in transit.

*Appeal from Ringgold District Court.*—HON. H. M.  
TOWNER, Judge.

VOL. 153 IA.—1.

SATURDAY, NOVEMBER 18, 1911.

ACTION to recover damages for injury to property in course of transportation over defendant's road. Judgment for plaintiffs, and defendant appeals.—*Reversed*.

*Spence & Smith* and *Miles & Steele*, for appellant.

*C. J. Lewis* and *V. R. McGinnis*, for appellees.

WEAVER, J.—The appellees purchased a valuable stallion at Bushnell, Ill., and delivered it to the appellant at that place to be shipped to their home at Diagonal, Iowa. The horse, which was accompanied by one of its owners, was taken sick during the trip and died soon after reaching its destination.

The theory of plaintiff's case, as alleged in their petition and presented upon this appeal, is that the transportation was unreasonably and unnecessarily delayed, and that, by reason of such delay and resulting exposure to inclement weather, the horse contracted the disease of which it died. Appellant insists, on the other hand, that there was in fact no material delay, and that the record discloses no evidence on which a verdict charging it with negligence as alleged in the petition can be sustained.

After considerable investigation, we are forced to the conclusion that appellant's contention must be sustained. Bushnell, Ill., and Diagonal, Iowa, are both stations upon the defendant's railway system. The plaintiffs reside at the place last named, but were personally present at Bushnell when the horse was delivered for shipment. The defendant's freight schedules upon which the road was then being operated were so arranged that a car sent out of Bushnell on the afternoon or evening of May 5, 1908, and making all the connections provided for in said schedules, would not arrive in Diagonal until about noon

of May 8th. There is no claim that plaintiffs did not fully understand the time required to make this trip, or that they asked for or received any assurance that the progress of their car could or would be accelerated beyond the rate indicated by the schedules. The shipment was delivered to the defendant about the middle of the afternoon of May 5th. It was accompanied by the plaintiffs, or one of them, and it arrived at its destination substantially on schedule time.

No fault appears to be found by the plaintiffs with the train schedules, but they say that, after discovering signs of sickness in the horse, they applied to the defendant's agents to hasten the transportation by attaching the car to a passenger train or otherwise, and that such requests were not granted. We think there are obvious reasons why failure to accelerate the movement of freight by attaching freight cars to passenger trains should not be held culpable negligence, and there is here no evidence of other or faster freight trains by the aid of which the destination of plaintiffs' car could have been sooner reached. It is true that the train taking the car west from Galesburg could have taken it to the junction point at Osceola, Iowa, on the evening of May 6th, instead of leaving it to be picked up by succeeding trains which brought it to said junction the following morning, but the movement of the car south from Osceola would not thereby have been hastened for the only connecting train did not leave there until about noon of May 7th, nor would it have been sooner forwarded out of Van Wert, the last junction point.

The charge of negligence made by the plaintiffs appears, therefore, to be without evidence to support it, and it follows that the judgment appealed from must be, and it is, *reversed*.

## STATE OF IOWA V. GEORGE YOUNG, Appellant.

**Criminal law: PERJURY: EVIDENCE.** The false testimony of one  
1 charged with having given liquor, within the county, to one in  
the habit of becoming intoxicated, that he had not furnished the  
party liquor at a particular place is material.

**Same: MOTION IN ARREST OF JUDGMENT.** An objection that the false  
2 testimony forming the basis of a charge of perjury was imma-  
terial, can not be raised by a motion in arrest of judgment;  
such a motion will only lie for some demurrable ground, or when  
upon the whole record no legal judgment can be pronounced.

**Same: WITNESSES: CAPACITY OF CHILDREN.** The capacity of a child  
3 as a witness can not be raised for the first time on appeal: And  
where a child is shown to have sufficient capacity to understand  
an oath, the question of age is not controlling.

**Same: PERJURY: SUFFICIENCY OF EVIDENCE.** The strongly corroborated  
4 evidence of one witness testifying to the falsity of accused's testi-  
mony will support a conviction for perjury.

*Appeal from Madison District Court.*—HON. EDMUND  
NICHOLS, Judge.

TUESDAY, OCTOBER 17, 1911.

THE defendant was convicted of having committed per-  
jury, and appeals.—*Affirmed.*

*Emory Nicholson and A. W. Wilkinson, for appellant.*

*George Cosson, Attorney General, and John Fletcher,*  
Assistant Attorney General, for the State.

LADD, J.—The defendant has been tried three times.  
The first indictment charged him with having given whisky  
to Will Gordon, a person in the habit of becoming intoxi-

cated. On trial he was acquitted. At the same term of court he was indicted for having committed perjury during the above trial, in that he had falsely testified that he had neither given whisky to said Gordon in a certain barn or paintshop on the 14th day of November, 1909. Though he was acquitted of the charge of having furnished his neighbor whisky, he was found guilty of having falsely testified that he had not done so. But on motion in arrest of judgment the verdict was set aside, and the case submitted to another grand jury. A second indictment charging the same offense was returned, and he was again found guilty and judgment entered accordingly. The appeal is from this conviction.

I. Appellant contends that the court erred in not passing on the ninth ground of the motion in arrest of judgment, and in not discharging him, for that the issue

alleged was not involved in nor the alleged  
1. CRIMINAL  
LAW: perjury: false testimony material on the trial of the  
evidence. indictment charging him with giving whisky to said Gordon. That indictment alleged the giving to have been in the county generally, and it is said that, even though the accused did falsely testify that he had not given Gordon whisky in the barn or paintshop, such evidence was immaterial, for that it did not appear that any one had testified otherwise. If this were true, his testimony would not have been in conflict with any evidence introduced by the state, but it would have been material as tending to show that he had not furnished the whisky in the county. This becomes apparent in looking at the result had he testified to the truth as claimed by the state; i. e., that he had given Gordon whisky at one of the places mentioned. Had he done so, his testimony would not only have been material, but likely conviction would have followed. Plainly enough, then, his denial that he had given the whisky at the place mentioned should be regarded as material.

Even were this not so, however, the point could not

properly be raised on motion in arrest of judgment. Section 5426 provides that such a motion may be granted (1) upon any ground which would have been ground for demurrer (2) when upon the whole record no legal judgment can be pronounced. It is needless to say that the insufficiency of evidence is not ground for demurrer. Nor do we think the evidence a part of the "record," as that term is used in this statute. It only becomes such when duly certified and filed as a bill of exceptions for the purposes of appeal. Their view is confirmed by section 5424 of the Code, making the insufficiency of the evidence one of the grounds for new trial, and farther by the overwhelming weight of authority declaring that neither the admissibility of evidence nor its insufficiency nor the correctness of the instructions can be challenged by motion in arrest of judgment. *State v. McCool*, 34 Kan. 617, (9 Pac. 745); *State v. Gerrish*, 78 Me. 20, (2 Atl. 129); *Green v. State* (Tex. Cr. App.) 29 S. W. 1072; *Bright v. State*, 90 Ind. 343; *Powe v. State*, 48 N. J. Law, 34, (2 Atl. 662); *State v. Washington*, 104 La. 443, (29 South. 55, 81 Am. St. Rep. 141). See cases collected in 2 Ency. Pleading & Practice 813, and 12 Cyc. 759. The record in a criminal case ordinarily is understood to be the written history of the proceedings from the beginning to the end, including such papers as are made by statute a part of the record and the evidence. *United States v. Taylor*, 147 U. S. 695, (13 Sup. Ct. 479, (37 L. Ed. 335); *State v. Anders*, 64 Kan. 742, (68 Pac. 668). There was no error in the ruling.

II. No objection was interposed to the competency of Harold Gordon as a witness and his capacity to testify cannot be questioned in this court for the first time. It may be added, however, that, had there been objection, it must have been overruled, for, though but twelve or thirteen years of age, the showing of his capacity to understand the obligation of

2. SAME: motion  
in arrest of  
judgment.

2. SAME: wit-  
nesses: capac-  
ity of children.

an oath was sufficient, and not disputed. See *State v. King*, 117 Iowa, 484; *State v. Meyer*, 135 Iowa, 507; *State v. Gregory*, 148 Iowa, 152.

III. It is insisted that the evidence was insufficient to convict. That it was in sharp conflict must be conceded. Gordon testified that the defendant brought a pint bottle

4. SAME: per-jury: sufficiency of evidence. of whisky when he was in his barn, and that he drank from the bottle. It was not essential that there be two witnesses to the falsity

of defendant's testimony; it being sufficient that the one witness be strongly corroborated. *State v. Wood*, 17 Iowa, 18; *State v. Raymond*, 20 Iowa, 582. However, the two sons of Gordon were in the loft of the barn with a nephew of defendant, and they testified to seeing the defendant hand a bottle of whisky to their father, and to seeing him drink therefrom.

The evidence was sufficient to carry the case to the jury, and the judgment is *affirmed*.

---

### STATE OF IOWA V. FRANK BRUMO, Appellant.

**Criminal law: DYING DECLARATIONS.** Statements made in the firm  
1 conviction of impending death are admissible in evidence as dying declarations; and when so made the length of time elapsing between the declarations and death is immaterial.

**Same: MURDER: EVIDENCE.** One who inflicts a wound from which  
2 death ensues is guilty of homicide, although if properly treated it would not have proved fatal; and evidence that it was not necessarily fatal is not admissible.

**Same: PROVOCATION: MITIGATION OF OFFENSE.** Abusive or insulting  
3 language will not justify an assault or constitute sufficient provocation to reduce to manslaughter an offense which would otherwise be murder.

**Same: NEW TRIAL: NEWLY DISCOVERED EVIDENCE.** On a prosecution  
4 for murder, alleged newly discovered evidence that decedent was intoxicated at a time and place other and prior to the fatal affray,

will not support a motion for a new trial: And evidence that decedent was of a quarrelsome disposition was immaterial, unless known to defendant at the time of the trouble, and if known he could so testify himself.

*Appeal from Pottawattamie District Court.*—HON. O. D. WHEELER, Judge.

TUESDAY, OCTOBER 17, 1911.

The defendant appeals from a conviction of murder in the second degree.—*Affirmed.*

*Wm. A. Mynster and John Lindt*, for appellant.

*George Cosson*, Attorney General, and *John Fletcher*, Assistant Attorney General, for State.

SHERWIN, C. J.—The defendant stabbed one W. C. Crumpton with an ordinary knife, or a stiletto, on the 8th day of December, and the wound caused death on the 28th of the same month. At the time of the affray Crumpton was a switchman working in the railroad yards at Council Bluffs, and the defendant worked for the same company in the same yards as a track laborer. At the time in question, the defendant was engaged with others in taking snow and ice away from the switches and rails, and Crumpton was engaged in switching in the same part of the yard. There was an altercation between Crumpton, the defendant, and the defendant's cousin, which resulted in Crumpton striking the defendant's cousin with his fist. Immediately after the blow, Crumpton started away from the scene of the trouble, but the defendant followed him some ten or twelve feet, and attacked him with the knife. The physician who attended Crumpton was permitted to relate Crumpton's statement of the transaction to him, made on the day of the occurrence, and only a few hours thereafter, and again

the next morning. The statement was admitted as the dying declaration of Crumpton, and its admissibility is assailed. The facts necessary to a proper understanding of the situation are briefly as follows. The wound was inflicted about 4 o'clock in the afternoon, and Crumpton was immediately taken to the baggage room in the nearby railroad station. The physician reached him there about 5 o'clock, and caused him to be at once taken to the hospital, where the first examination of his wound was made. While the physician was with Crumpton at the hospital that night, Crumpton said to him: "I know I am going to die. I want you to write to my mother." It also appears that at the time the deceased was in fact in a critical condition. The next morning he made substantially the same statement to and request of the physician. Both at night and in the morning Crumpton told the physician what had taken place between the defendant and him. The evidence also shows that Crumpton continued to believe that he would die from the effects of the wound. That his belief was well founded is apparent. The appellant contends that the physician's testimony was incompetent, because of the time that elapsed between the declaration and death.

I. To make dying declarations admissible, it is necessary to show that such declarations were "made at a time when the declarant expected to soon die." "This must amount to a conviction." "A mere transient or fleeting impression" is not sufficient. If these elements are satisfactorily shown, the time elapsing between the declarations and the death is not material. *State v. Schmidt*, 73 Iowa, 469; *State v. Nash*, 7 Iowa, 347; 1 Greenleaf Evidence 158. That the instant declarations were made "under a sense of impending death" we do not doubt. Deceased had received a mortal wound, and he seems to have fully realized his condition, and was conscious that death could not long be delayed. The testimony of the physician was rightly received. *State v.*

1. CRIMINAL  
LAW: dying  
declarations.

*Dennis*, 119 Iowa, 688; *State v. McKnight*, 119 Iowa, 79; *State v. Johnson*, 72 Iowa, 393.

II. The defendant called medical witnesses to show that the wound he inflicted was not necessarily fatal. This testimony was rightly rejected. 1 McClain, Crim. Law, section 292.

Complaint is made that the fifty-fifth paragraph of the instructions, considered in connection with the fifty-second, fifty-third, and fifty-fourth paragraphs, tended to mislead the jury. The fifty-fifth paragraph is as follows: "No mere words, although abusive and insulting, will justify an assault or constitute sufficient provocation to reduce to manslaughter an offense which would otherwise be murder." The language quoted was approved in *State v. Hockett*, 70 Iowa, 442, and taken in connection with the other paragraphs referred to, it fully stated the law.

There was no error in refusing a new trial on the ground of newly discovered evidence. The evidence was to the effect that Crumpton was intoxicated at another place about three hours before the affray, and that he was of a quarrelsome disposition. Whether he was then intoxicated was immaterial, and whether he was of a quarrelsome disposition was immaterial under this record, unless it was known to the defendant at the time of the trouble, and, if it was true and so known to him, he could have so testified himself, which he did not do. There was no error in not granting a new trial on account thereof. *State v. Dimmitt*, 88 Iowa, 552; *State v. Reinheimer*, 109 Iowa, 624. The instructions relating to dying declarations were in accord with what we have already said on the subject, and were properly given. It is earnestly contended that the evidence is wholly insufficient to support the verdict, and that a new trial should be ordered. We have given the evidence a very careful examination, and reach a different conclusion. We have already

2. SAME: murder: evidence.

3. SAME: provocation: mitigation of offense.

4. SAME: new trial: newly discovered evidence.

stated the controlling facts, and need not repeat them, or go more into the details of the evidence.

The judgment is *affirmed*.

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HESSIG-ELLIS DRUG Co., Appellant, v. TODD-BAKER DRUG Co., Appellee.

**Contracts:** ALTERATION: GENUINENESS OF SIGNATURE. The genuineness of a signature to a contract is not affected by a subsequent alteration of the contract in a matter not related to the signature.

**Same:** ALTERATION OF INSTRUMENTS: PLEADINGS. The answer to a suit upon a contract which simply denies the identity of the instrument and the genuineness of the signature does not tender an issue of alteration of the instrument; there must be affirmative allegations setting out the unauthorized alteration.

*Appeal from Woodbury District Court.*—HON. F. R. GAYNOR, Judge.

WEDNESDAY, OCTOBER 18, 1911.

ACTION on contract. There was a verdict and judgment for the defendant and the plaintiff appeals.—*Reversed*.

*R. H. Brown*, for appellant.

*A. & J. A. Van Wagenen*, for appellee.

EVANS, J.—The contract sued upon is as follows:

This agreement, made this 4th day of September, by and between Hessig-Ellis Drug Company, of Memphis, Tennessee, the party of the first part, and Todd-Baker Drug Company, of Sioux City, Iowa, the party of the second part, witnesseth:

First. In consideration of the purchase of a certain quantity of the product of the party of the first part by

the party of the second part, said product being known and described as 'Dr. Nott's Cuban Hair Restorer and Tonic,' the amount of said purchase being designated by order given this day and date, and which for the purpose of identification is marked 'A,' now, therefore, in consideration of the faithful fulfillment of the terms of said order 'A,' together with the terms of this contract by the party of the second part, the party of the first part agrees to contract with the Zellner Adv. Agcy., Memphis, Tennessee, for from 10,000 to 20,000 lines agate measure of advertising, specifying the Tribune and Journal papers, singly or divided, said advertising to be executed during the twelve months following date of the delivery of the goods described by order 'A' at Sioux City.

Second. The party of the first part agrees not to sell to any other dealer than the party of the second part in the town of Sioux City, during the term of this agreement, the product known as 'Dr. Nott's Cuban Hair Restorer and Tonic,' but the party of the second part agrees to sell to any dealer in his territory who may be deemed worthy of credit or who tenders cash at the regular net wholesale price, it not being the purpose of either party to this agreement to commit any act in defiance of the federal or state laws regulating commerce.

Third. It is agreed by and between the parties of the first and second part, and is an element of this agreement, that if for any reason the party of the first part should default or commit any breach of this agreement, then it shall be at the option of the party of the second part to at once return all goods unsold at the full invoice price to party of the first part, and the party of the first part, in event of such contingency, agrees to accept any unsold goods described by order 'A,' and will remit on receipt of same.

Fourth. It is further agreed by and between the parties to this agreement that only the mailing list of the party of the second part shall be used in the distribution of booklets or circulars or any advertising matter distributed in his territory relating to or describing Dr. Nott's Cuban Hair Restorer and Tonic during the life of this contract, and that every bottle given to customers under the coupon system shall be replaced free of cost by the party of the first part.

Fifth. It is agreed and understood that the party of the second part will keep a sign on windows or doors, or counters of or in their place of business, reading 'Local Distributer of Dr. Nott's Cuban Hair Restorer and Tonic.'

Sixth. We hereby authorize the Hessig-Ellis Drug Co. to place an order for advertising as provided for in clause first of this agreement through the Zellner, Memphis, Tenn., Advertising Agency, at the expense of the party of the first part. This contract not subject to cancellation, except with approval of both parties hereto, after acceptance of the same by the party of the first part.

[Signed] Todd-Baker Drug Company.

In consideration of the fulfillment of the terms of the order 'A' and contract 'B' by the party of the second part, the party of the first part agrees to take back at full invoice price all goods remaining unsold in the hands of the party of the second part at the end of the Iowa advertising contracts.

In pursuance of the foregoing contract, the defendant placed an order with the plaintiff for a large amount of the goods therein described. The principal question presented for our consideration is one of pleading. Ignoring the defendant's answer for the moment, its real contention in argument and evidence is that the contract entered into between plaintiff and defendant was materially and fraudulently altered, without the defendant's consent, after the execution thereof by the defendant. Its specific contention is that at the time of the execution of the contract the last paragraph thereof was in the following form: "In consideration of the fulfillment of the terms of the order 'A' and contract 'B' by the party of the second part, the party of the first part agrees to take back at full invoice price all goods remaining unsold in the hands of the party of the second part at the end of the ——— advertising contracts." Its further contention is that the alteration was made by the insertion of the word "Iowa" in the blank space before "advertising contracts." The trial court submitted the case to the jury upon this theory. The following instructions

4 and 5, given by the trial court, present a succinct recital of the salient facts of the case:

Instruction 4: Par. 4. From the undisputed evidence it appears that on or about the 4th day of September, 1908, one J. J. Murphy, representing the plaintiff herein, called upon this defendant in this city; that the contract, Exhibit B, and the order, Exhibit A, were presented to the Todd-Baker Drug Company through Mr. Todd; that the order, Exhibit A, was signed by the Todd-Baker Drug Company and delivered to Mr. Murphy for the plaintiff; that the contract, Exhibit B, was signed by the Todd-Baker Drug Company and delivered to Mr. Murphy for the plaintiff; that subsequently the plaintiff shipped to the defendant at Sioux City, Iowa, the goods called for by the order, Exhibit A, and were received by the defendant, and the plaintiff is entitled to recover therefor the amount therein stipulated, with 6 per cent., as provided in the order, Exhibit A, unless the plaintiff's right to recover is defeated by the matters set up by the defendant in his answer, to which your attention is hereinafter called.

Instruction 5: Par. 5. The defendant claims in his answer that after the contract, Exhibit B, was executed by the defendant and delivered to the said Murphy for the plaintiff, the same was fraudulently altered in a material respect in this: That the word 'Iowa' was inserted in the contract before the words 'advertising contract,' which word was not in the contract, Exhibit B, as signed by the defendant, and thereby the contract as entered into between the plaintiff and the defendant, through the said Murphy, was so changed as to materially affect the rights of the defendant under the contract as executed by the defendant; and defendant claims that the contract as originally made and signed by this defendant provided that the plaintiff would contract with an advertising agency at Memphis, Tennessee, known as the Zellner Advertising Agency, for 10,000 to 20,000 lines agate measurement of advertising, specifying the Tribune and Journal newspapers at Sioux City, Iowa, equally or divided, said advertisement to be executed within twelve months after the delivery of the goods named in said order, and the contract, as executed, providing further that in fulfillment of the order (Exhibit A) and contract

(Exhibit B) the party of the first part agrees to take back at full invoice price all goods remaining unsold in the hands of the party of the second part, the defendant herein, at the end of the advertising contract, the defendant claiming that the advertising contracts referred to are those which the plaintiff agreed to make with an agency at Memphis, Tennessee, known as the Zellner Advertising Company, which contracts the defendant says were to be executed within twelve months after the delivery of the goods. That the contract as sued upon, by the insertion of the word 'Iowa,' changed the rights of the parties materially in this: That the contract as altered places no obligation upon the plaintiff to take back at full invoice price all goods remaining unsold in the hands of the party of the second part at the end of the twelve months, as provided in the first paragraph of the contract (Exhibit B), but leaves it to the plaintiff to refuse to take said goods in the hands of the defendant unsold until at the end of the Iowa advertising contracts, the terms of which the defendant claims are not definitely provided for in the contract, and thereby enlarges the rights of the plaintiff, to the prejudice of the defendant. If the defendant has shown this by a preponderance of the evidence, and that the contract (Exhibit B) was fraudulently altered in this respect after the same was executed by the defendant, and without the knowledge and consent of the defendant, the plaintiff cannot recover on said contract in this action, and your verdict should be for the defendant, unless, etc.

The complaint of the appellant is that the defendant's answer did not plead a material or fraudulent alteration of the contract, and that the defendant was not entitled to have such issue submitted to the jury for want of pleading. The defendant's original answer was as follows: "Defendant specifically denies that he ever signed any contract and order, *as claimed by plaintiff* and set out in its petition, and says that the signature, if any, attached to *any such order and contract*, is not the genuine signature of this defendant, and defendant specifically denies the genuineness of any such signature of this defendant." During the trial the defendant filed an amended answer as follows: "Defend-

ant states that it signed a contract similar to the one sued upon, but not the contract sued upon, for in the contract sued upon is the word 'Iowa' before the words 'advertising contract,' which word was not in any contract signed by defendant, and the defendant states that the signature to the contract sued upon in the plaintiff's petition is not the genuine signature of this defendant."

In the original answer the denial of the genuineness of the signature was made under oath in compliance with the provisions of section 2730 of the Code of 1873. It is

1. CONTRACTS:  
alteration:  
genuineness  
of signature.

manifest that such answer did not raise any question as to the material alteration of the contract. The theory of the appellee in argument is that the alteration of the contract destroyed the genuineness of the signature and rendered it spurious. This is argumentative only. The genuineness of a signature, as contemplated by section 2730 of the Code, presents a question quite distinct from that of the validity or invalidity of the contract. If the signature was once genuine, it does not lose such character because of the invalidity of the contract upon other grounds than those related to the signature. During the trial, as a matter of evidence, the defendant admitted the genuineness of the signature. Nothing was left, therefore, as to this particular defense. This was the theory adopted by the trial court in instruction 4.

Turning, now, to the amended answer, which we have quoted above, can we say that such amendment pleads affirmatively a material alteration of the contract after the

2. SAME: al-  
teration of  
instruments:  
pleadings:

execution thereof, and without the consent of the defendant? We are not disposed to draw the line too fine upon a question of pleading at this stage of a trial. We have often overlooked defects in pleadings, where the parties have manifestly tried the case upon a certain theory, and where the question of the sufficiency of the pleading has been first raised in this court. In this case, however, the appellant appears to

have been diligent and persistent, in the court below, in assailing the sufficiency of the defendant's answer to raise any issue as to material alteration. We think it must be said that such answer is clearly insufficient for such purpose. If the defendant had filed an amendment to conform to its evidence, and to the theory upon which the trial court submitted the case, it could have obviated the entire difficulty. The amended answer contains nothing but a denial of the identity of the contract and the genuineness of the signature. For aught that appears in the answer, the insertion of the word "Iowa" might have been material or immaterial; it might have been done with or without the consent of the defendant; it might have been done without the consent of the plaintiff or any of its authorized agents. It was clearly incumbent upon the defendant to tender an issue by affirmative allegations upon the question of alteration, and it was the right of the plaintiff to reply thereto by appropriate pleading.

We see no escape from the conclusion that the appellant is entitled to a new trial. The judgment below must therefore be reversed, and a new trial is ordered, without prejudice to the discretion of the trial court to permit such further amendments to pleadings as it shall deem proper.  
—*Reversed.*

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W. H. HOWERTON, Appellee, v. J. H. AUGUSTINE, Appellant.

**Appeal:** CERTIFICATION OF RECORD. A certificate of the proceedings of a trial written in shorthand is not such a certification of the report of a trial as the statutes require; the same should be written out in long hand. And a complete translation of the record and certificate, certified by the reporter and judge after the time for filing a bill of exceptions as fixed by the statute, will not cure the previous defective certification.

*Appeal from Mahaska District Court.*—HON. BYRON W. PRESTON, Judge.

THURSDAY, OCTOBER 19, 1911.

ACTION for damages for false representation in the sale of land. There was a verdict and judgment for the plaintiff. The defendant has appealed. Appellee plaintiff challenges the sufficiency of the record for the purpose of an appeal and in an amended abstract denies the preservation of the evidence. Motion to dismiss *sustained*.

*H. L. Bump and Burrell & Devitt*, for appellant.

*Liston McMillen and I. C. Johnson*, for appellee.

EVANS, J.—Appellee has filed a motion to dismiss the appeal for want of sufficient record. Such motion has been submitted with the case, and we give our first consideration to it.

The trial below was completed March 5, 1910. On that day an alleged certification of the evidence was signed by the presiding judge and the reporter, and filed by the clerk. The sufficiency of such certification is challenged by the appellee on the ground that the certificate was written in shorthand only. The question presented is: Was it a sufficient compliance with Code, sections 3675, 3749, 3752, 3753, to attach to the shorthand report of the trial a certificate in shorthand only? Such certificate was later transcribed by the shorthand reporter, and a complete transcript of the entire report of the trial was made by the reporter, and certified to by himself and the presiding judge. But this was not done within the time provided for filing a bill of exceptions by section 3749. The writer hereof inclines to the view that the method of certification adopted should be held as *prima facie* sufficient, and that

it is unduly technical to hold that its shorthand form is fatal thereto. The argument for this view is that such certification furnished a sufficient basis within the statutory time for a later certified translation. Such later certified translation has been made. Granted that the certificate in shorthand form was illegible to the ordinary person, it was no more so than was the entire shorthand report of the trial.

However, the majority of the court is of the opinion, in substance, that shorthand characters are not "writing" within the meaning of the statute, and that a certificate in such form is not a certificate at all within the meaning of the statute. The argument in support of this view is that conclusive identification is the purpose of the certificate and that a certificate in shorthand does not furnish such identification to the ordinary person until after it shall have been translated. There was therefore no certification in this case within the statutory time. The question bears some analogy to that involved in *Bank v. Meldrum*, 128 Iowa, 694. The view of the majority is consistent with the holding in that case. The effect of the decision in the cited case, however, was avoided by later legislation.

II. Appellant urges upon our attention that a complete translation of the shorthand notes of the trial, including the shorthand certificate thereof, was duly certified by the reporter and judge, and the same was duly filed on September 16, 1910. It is urged that the certification of the complete transcript by the reporter and judge cured the alleged defect in the original certification of the shorthand notes. The difficulty with this contention is that the certification thus relied on was done after the expiration of the statutory time for signing and filing a bill of exceptions. If the first certificate of the shorthand notes was not a sufficient compliance with the sections of the statute above referred to, then there was no bill of exceptions filed within the statutory time. This being so, no subse-

quent certification could supply such omission. The cases of *Smith v. Wellslager*, 105 Iowa, 140, and *Hofacre v. Monticello*, 128 Iowa, 242, are cited by appellant in support of the proposition that the statute fixes no time within which the translation of shorthand notes must be filed. It is sufficient if such translation be filed at any time appropriate to the purpose of appeal. But such holding does not reach appellant's case at all. If the appellant had filed a proper bill of exceptions within the statutory time, there could be no doubt of the sufficiency of the transcript for the purpose of this appeal. Under the statute the shorthand report of the trial duly certified and filed within the statutory time is deemed to be a bill of exceptions. It fixes the record. The later transcript is ruled by it, and must conform to it. Even the judge and reporter could not properly certify to a later translation at variance with the shorthand report. The appellant's difficulty is not that he has failed to file a proper translation of the shorthand report, but that he has failed to file a proper bill of exceptions within the statutory time.

We must hold, therefore, that the evidence is not before us, and we cannot pass upon any questions involving a consideration of the evidence. Only questions pertaining to evidence are presented for our consideration by appellant's brief. The motion to dismiss must therefore be *sustained*.

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LEE J. CHAPMAN, Appellee, v. JOHN F. PFAAR and others,  
Appellants.

**Negligent sale of explosives:** SUFFICIENCY OF PLEADING. Allegations that defendant sold plaintiff's wife, as kerosene, a dangerous mixture, which in fact contained a large percentum of gasoline, after notice of its dangerous character, and failure to have it examined by an expert, were sufficient to charge actionable negligence; especially as it had been so regarded by the parties without objection on that ground through two trials of the case.

**Same: INSTRUCTIONS.** It is the duty of a dealer in kerosene oil, upon receiving notice that would lead a reasonably prudent person to think that it was not of the required test, but contained an explosive substance in dangerous quantities, to make such an examination and test as a reasonable prudent dealer would make under such circumstances, using the knowledge and appliances of such a person in making the test. And the instructions in this case fairly state the rule.

**Same.** In determining the question of negligence in the sale of oil as kerosene, which in fact contains a dangerous percentage of gasoline, the fact that it contained gasoline, that injury resulted from the use thereof, and that an examination by an expert inspector might have revealed its true character, are proper matters for the consideration of the jury. And the question of whether defendant, after notice of the dangerous character of the oil, took all the precautions that could reasonably be required of him was for the jury.

**Same: DAMAGES: LOSS OF WIFE AND MINOR CHILDREN.** There is no fixed rule by which to measure the damages resulting from loss of services, the negligent death of minor children, and the loss of society of a husband or wife, but it is a matter largely in the discretion of the jury. In the instant case the sums allowed are not so excessive as to indicate passion and prejudice.

*Appeal from Harrison District Court.*—HON. E. B. WOODRUFF, Judge.

THURSDAY, OCTOBER 19, 1911.

ACTION to recover damages for the personal injury of the plaintiff and for the loss of the services of three minor children and of the society of his wife, all of whom are alleged to have met their death through the negligence of the defendants. There was a trial to a jury resulting in a verdict and judgment for plaintiff, and defendants appeal.—*Affirmed.*

*Shaw, Sims & Kuehnle* and *C. A. Bolter*, for appellants.

*S. H. Cochran*, for appellee.

WEAVER, J.—The plaintiff's wife and three young children were fatally injured by an explosion of kerosene oil or an article supposed to be kerosene oil purchased from the defendants, and he brings this action at law to recover damages. A former judgment in his favor was reversed by this court for error in the charge to the jury, but it was held that the evidence was sufficient to justify the submission to the jury of the question of defendants' alleged negligence. 145 Iowa, 196. There was also a prior verdict in plaintiff's favor, which was set aside by the trial court for reasons not material to the consideration of the present appeal. The plaintiff, a farmer, resided near the town of Pisgah, where the defendants were retail dealers in merchandise, including kerosene oil and gasoline. On May 25, 1907, they by their agent or manager sold and delivered to plaintiff's wife one gallon of an article purporting to be kerosene. Returning with it to her home, Mrs. Chapman attempted to use some of the oil in lighting a fire of corncocks, when an explosion occurred, resulting in the death of herself and three young children. It was admitted of record that the article so sold the wife contained 21 percent of gasoline, but it is denied that defendants or their agent knew of the dangerous mixture, or were negligent in respect thereto. When purchased by defendants, the barrel from which the sale was made bore the stamp of the state oil inspector, indicating a flash test of 106 degrees. After they began selling from this barrel, and before the sale to Mrs. Chapman, a customer who had taken some of the oil home telephoned to the store, giving notice there was something wrong with it, and advising that it be tested. Thereupon defendants' manager claims he drew some of the oil, and, taking it to the alley, tested it by the application of lighted matches, and, finding no indication of anything wrong, telephoned the customer it was all right. That the admitted facts and the sworn testimony made a case for the jury upon the question of defendants' negligence was, as we have

already noted, determined upon the former appeal, and is no longer open to argument. Indeed, were it still undecided, the conclusion that the showing is sufficient to sustain a finding against defendants upon that proposition would be too evident to admit of serious argument. We shall therefore confine our consideration of the appeal to an inquiry whether prejudicial error is shown in other rulings of the trial court.

I. In a motion to direct a verdict in their favor after the evidence was all in, defendants, among other things, raised the objection that the petition made no sufficient charge of actionable negligence on their part. The case then had been pending for some three years, and had been tried to a jury without any objection to the sufficiency of plaintiff's pleading to sustain a finding in his favor. This fact may not be a good ground for overruling the point made against the petition if that pleading be clearly and radically insufficient, but it does afford a very good reason why the plaintiff will not be sent out of court upon such a motion if by any fair reading or reasonable interpretation of his petition the merits of the controversy can be adjudicated thereon.

The charge of the petition which is here involved is, in substance, that defendants' agent sold and delivered the oil to plaintiff's wife after he had been notified of its dangerous character, and did not have the oil inspected by an expert oil inspector. It is said by counsel that it is not enough to charge that the sale was made after the agent received notice that something was wrong with it, but that, to make a case, it was incumbent on the plaintiff to specifically allege and prove that the agent actually knew the oil was dangerous, or by the exercise of reasonable care in the test made by him he ought to have discovered that fact. We are of the opinion that such specific allegation is not necessary to the statement of a cause of action. The

1. NEGLIGENT  
SALE OF EX-  
PLOSIVES:  
sufficiency of  
pleading.

substance of the charge as made is that, instead of delivering to the purchaser the oil for which she asked, the agent delivered to her a dangerous mixture containing 21 per cent. of gasoline, and that such sale was made after notice of the character of the article. The word "negligence" is not here used, but the sum and substance of the allegation is an allegation of negligence, and the motion to direct a verdict on this ground was properly denied. It should be further said in this connection that the case was tried and retried on the theory that the issues were sufficiently broad to permit all these phases of the case to be considered, and we are satisfied to accept this practical interpretation of the pleadings by all concerned. If it be alleged and proved that defendants sold for oil a mixture containing 21 percent gasoline, we are not now prepared to hold that no cause of action is shown, or that, upon such showing, it does not become incumbent on the seller to show that he acted with due care, but, if there be any doubt upon this proposition, there is scarcely room for any, where it is alleged that such sale and delivery were made after notice of the dangerous character of the article.

Plaintiff also charged the defendant with negligence, in that, after having notice that something was wrong with the oil, they failed to have the same examined by an expert inspector. Concerning this allegation, the court instructed the jury as follows:

(6) . . . As Strong was the agent of the defendants carrying on the store in question, his negligence, if he was negligent, would be the negligence of the defendants. It was his duty to use reasonable and ordinary care not to sell oil which did not conform to the test required by law. In the first instance, and until he had knowledge or notice to the contrary, or such notice as would put a reasonably prudent man upon inquiry, which would lead to such knowledge, he had the right to rely upon the inspector's stamp or brand upon the barrel from which the oil sold to plaintiff's wife was taken. If

however, such information came to him prior to the sale of the oil to plaintiff's wife as would put an ordinarily prudent person upon inquiry and investigation that would have developed the fact that the oil in question was not up to the required test, then he was negligent in not making such investigation or having it made before making further sales of the oil. There is no requirement that the seller of oil provide himself with apparatus for making the closed test such as the statute requires to be made by the inspector, and there is no specific requirement of law that the seller shall under any circumstances call upon a state inspector to determine the character of oil which has been purchased in a barrel properly branded. It was the duty of the said agent, Strong, on receiving information, if he did receive it, such as would lead a reasonably prudent man to think that the oil which he was selling out of said barrel did not correspond to the brand on the barrel, to himself make or cause to be made by some competent person such inspection as would reasonably determine whether the oil which he was selling was in fact dangerous; that is, of a lower standard than that required by statute.

(7) The said Strong had the right to rely on the inspector's brand on the barrel, indicating that the oil in the barrel was of the standard required by statute until he had information such as would indicate to a reasonably prudent man dealing in oil that it did not correspond to the standard indicated by such brand, and the real question for determination by you is whether the said Strong was negligent after receiving such information, if he did receive it, in making the test which he did make, or in not making or having made a different or more thorough test than that which he in fact did make, either by himself or some other competent person.

(8) It is a question of fact for you to decide from all the evidence in the case whether the said Strong did make, or might have made with the means at his command, such a test as did disclose or would have disclosed the dangerous character of the oil in question, and, in this connection, it becomes important for you to determine from the evidence whether the test which Strong made and the results which he obtained from such test were sufficient to justify an ordinarily prudent man in believing that the oil in question

was up to the required standard; and you should take into consideration the manner in which he did make the test, and whether, with the means at hand and with the knowledge which the ordinarily prudent dealer in oil would be presumed to have as to the nature of illuminating oil and the method of determining its safety for use, he did make, or could have made, such a test as would have shown the dangerous character of the oil in question, and, taking into consideration all the facts and circumstances known to Strong at the time and all the evidence in the case relating thereto, it is for you to decide whether the said Strong was negligent in selling the oil in question to plaintiff's wife, and, if you find under the evidence that he acted as a man of ordinary prudence would have acted under like circumstances, then he was not negligent, and plaintiff cannot recover herein.

Vigorous complaint is made of these instructions. It is urged that they impose upon the defendants a greater burden than the law will justify. Specifically it is said

2. SAME: in-  
structions.      that the effect of these instructions was to drive the defendant to the necessity of discovering the explosive character of the oil at all hazards, subject to the charge of negligence upon failure to make such discovery; that is, although he could only be expected to act as a reasonably prudent dealer would under like circumstances, using the knowledge and appliances of such person in making any test, yet if, with such skill and equipment and doing as such person would do, he failed to discover the actual condition of the oil, then, under the instruction, the jury had the right to find him guilty of negligence.

If such were in fact the meaning and effect of the language of the trial court, we could readily agree with counsel that "the mere statement of the proposition shows the vice of the instruction," but such conclusion can be reached, only by subjecting the court's charge to a very hypercritical interpretation and reading into it a meaning quite evidently not intended; nor do we think that any such

meaning could have been extracted from it by the jury. Taking the charge as a whole, it fairly reflects the law of the case as settled upon the former appeal.

II. Special complaint is made of the refusal of two instructions numbered 8 and 9 asked by the defendants. So far as the ninth request stated correct propositions of law, they seem to have been sufficiently covered by the charge of the court.

The eighth request was to the effect that the jury in passing upon the question of defendants' alleged negligence could not give any consideration or weight whatever to the

fact that the oil contained 21 per cent. of gasoline, nor the fact of injury resulting therefrom, nor to the fact that an examination by an expert inspector might or would have revealed the true character of the mixture. The request was properly refused. It asks altogether too much. The very fact that a dealer handling oils and gasoline passes out a mixture containing 21 percent of the latter as being oil or kerosene suitable for ordinary domestic use is a circumstance from which under some circumstances at least a jury may be justified in drawing an inference of negligence. Suppose, instead of 21 percent, the proportion of gasoline is 50, 75 or 90 percent, or suppose a barrel of unmixed gasoline bears the inspector's brand as kerosene, and the dealer draws the liquid from day to day and sells it as kerosene, will it be argued that the jury cannot rightfully consider this fact as bearing upon such dealer's degree of care? Must the court say in such instance as a matter of law that the brand will protect the dealer from the charge of negligence? Is there not a point somewhere where the dangerous character of the article will be so evident to the senses that a dealer having presumed familiarity with the characteristics of kerosene and gasoline will or ought to detect the true nature of the article he is handling. A fair consideration of these things will demonstrate to the unprejudiced mind that the

request of the defendants in this respect was properly refused.

So, also, with respect to the proposition concerning the alleged failure to call in an inspector. The most which can be said in this respect is that, upon the former appeal, we said, in substance, that such failure could not be held negligence as a matter of law, but whether defendants' agent took all the precautions which were reasonably required of him was for the determination of the jury in the light of all the proved circumstances. The rulings of the court on the new trial fairly conform to this standard, and we find no error therein.

Finally, it is said the verdict and judgment are excessive. The jury assessed plaintiff's damages for his own personal injury at \$160, for the loss of the services of his three children, aged, respectively, one year, 4. SAME: damages: loss of wife and minor children. three years, and nine years, at \$299.71 each, and for the damages on account of his wife, who lived only a few hours after the accident, at \$25. There is no exact mathematical rule or standard by which such damages can be stated or estimated with unvarying exactness, and it must be largely left to the sound, impartial discretion of the jury. The sum allowed does not impress us as great enough to indicate passion or prejudice in the jury, and we have no inclination to disturb it.

The judgment of the district court is *affirmed*.

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WOODBURY COUNTY and D. B. SHONTZ, Appellants, v. O. B. TALLEY, Treasurer of Woodbury County.

**Taxation:** OMITTED PROPERTY: NOTICE: SUFFICIENCY. The notice of a county treasurer of his intention to assess "moneys and credits" as omitted property, and reciting that the same consisted of notes and corporate stock, was sufficient to inform the corporation of an intention to assess corporate stock; especially where the cor-

poration appeared by counsel before the treasurer in response to the notice.

**Same: CAPITAL STOCK: ASSESSMENT ROLL: DESCRIPTION.** Where the 2 entries upon the assessor's book indicated that the capital stock of a trust company had been assessed, the fact that the trust company was the owner of stock in a bank of about the same value, which did not appear to have been assessed, did not warrant the inference that the assessment made was upon the bank stock and not upon the capital stock of the trust company.

**Same: VALUATION OF PROPERTY: FRAUD.** Where an assessment is for 3 a substantial amount and there is no material disparity between the amount and the actual value of the property fraud will not be imputed to the taxing officers so as to invalidate the assessment.

**Same: VALUATION OF PROPERTY.** Where property has once been as- 4 sessed though at an undervaluation not amounting to fraud it can not be again assessed as omitted property.

**Same: ASSESSMENT OF CAPITAL STOCK: EVIDENCE.** In this action to 5 review an assessment of omitted property the evidence is held to show that the capital stock of a loan and trust company was not assessed in a particular year.

**Same: STATEMENT BY CORPORATION: EFFECT.** Statements which the 6 statute requires a corporation to furnish an assessor relating to the value and description of its capital stock and real estate are in the nature of admissions, which may be considered by the treasurer in determining whether property of the corporation has been omitted from assessment, whether the same were ever before the assessor or not.

**Same: ASSESSMENT BY TREASURER: RECORD.** It is essential that the 7 treasurer in assessing omitted property make a record of his action in some form, and this may be done in the manner prescribed for listing omitted property generally, by an entry in the tax list or other book kept for the purpose of evidencing the final determination of the treasurer.

**Same: VALUATION OF PROPERTY BY TREASURER: REVIEW.** The county 8 treasurer alone is clothed with authority to determine the value of omitted property for the purpose of taxation, and no appeal lies from his finding, nor can the amount of his assessment be reviewed by *certiorari*.

*Appeal from Woodbury District Court.—HON. F. R. GAYNOR, Judge.*

WEDNESDAY, FEBRUARY 15, 1911.

A writ of certiorari was issued to the County Treasurer returnable to the District Court which upon hearing was dismissed. The plaintiffs appeal. *Affirmed.*

*Ben McCoy, McCoy & McCoy, and Struble & Struble,* for appellants.

*F. E. Gill and Shull, Farnsworth & Sammis,* for appellee.

LADD, J.—The Farmers' Loan & Trust Company was duly notified by the treasurer of Woodbury county of his purpose to assess it on moneys and credits described as consisting of notes and shares of corporation stock, etc., "withheld or omitted from taxation in 1903 and the five years following in the sum of \$600,000 each year, and a time in February, 1908, fixed for hearing." At the time designated, the company appeared by counsel, and a full hearing was had. The treasurer filed a written opinion finding that the company was assessed by the assessor for the years 1903, 1905, 1906, and 1907, and each of said years, . . . and that said assessments, whether right or wrong, are not reviewable, and that for 1904 "no assessment was made of the Farmers' Loan & Trust Company except as a stockholder in the First National Bank of Sioux City, Iowa, and that said assessment was made by the assessor in assessing the stock of the First National Bank, and not intended as an assessment of the Farmers' Loan & Trust Company. I therefore conclude that said Farmers' Loan & Trust Company should be assessed for the year of 1904, and find the net value of its shares of capital stock, after all deductions as provided by law, to have been \$564,626, one-fourth of which, or taxable value, was \$141,156, and said Farmers' Loan & Trust Company is

accordingly so assessed, to which said Farmers' Loan & Trust Company excepts." Subsequently the treasurer entered on the tax list an assessment of the capital stock of said company for 1904 of \$41,923 and computed the taxes payable at \$3,269.99, and for this amount the treasurer sued the company, filing his petition March 26, 1909. This action was begun in December of the same year, and, in return to a writ of certiorari, a transcript of the proceedings before the treasurer and the evidence upon which he acted were filed in the district court. The plaintiff prayed "that an assessment be made against said shares of stock and against said Farmers' Loan & Trust Company for said years 1903 to 1906, inclusive, in the values herein set out; and that the action of said treasurer in refusing to assess said stock for the years 1903, 1905, and 1906, be annulled, set aside, and held for naught, and that a true and correct assessment of said stock for the year 1904 be made, and that the plaintiff have judgment for costs in this action." The plaintiff moved for judgment as prayed, and defendant moved to quash the writ and to dismiss, and also filed a plea in abatement. These papers are too prolix to permit of setting out their substance even, and we shall give attention only to such matters as seem essential to dispose of the case.

I. The treasurer's notice addressed to the Farmers' Loan & Trust Company is said to have been insufficient in that it named "moneys and credits" as the omitted property he proposed to assess, and not corporation stock. The latter was the only property claimed to have been omitted; but "moneys and credits" were described in the notice as consisting of "notes and corporation stock," so that the company was apprised that such stock might be contemplated. This was all that was necessary in view of the fact that the company appeared by counsel and the only controversy related to the assessment of its corporate stock.

1. TAXATION:  
omitted prop-  
erty: notice:  
sufficiency.

II. The county treasurer held that the company's capital stock was assessed in 1903, 1905, and 1906. The plaintiffs contend: (1) That in none of these years was there such an assessment; and (2) if there was that it was so inadequate that it should have been treated by the treasurer as none at all. On the assessor's book of 1903 as returned to the county auditor, the assessment appears as follows: In the column under "Owners' Names," is the name of the company, and in the column under "Corporation Stock" and "Actual Value" is \$90,068. For 1905 the entry in the first column is the same, and in the second mentioned it is "\$183,612," and in the column under "Moneys and Credits," "Actual Value," is "\$61,704." For 1906 there are two entries: (1) The entry in the first column is as above, and, in that under "Corporation Stock," "\$40,472." (2) In the first column is "First National Bank Shareholders Farmers' Loan & Trust Company," and, in column under "Corporation Stock," "\$129,600." The company had submitted what appears to have been a full statement of its assets to the assessor each of the above years, and these were before the treasurer. In them it was disclosed that the company owned stock in many banks, among which was the First National Bank of Sioux City. One thousand nine hundred and seven of the two thousand shares of said bank stock were assessable to it, and plaintiffs contend that an examination of the several statements of the company demonstrates that in the years mentioned the assessments were of the National Bank stock instead of the capital stock of the Farmers' Loan & Trust Company. It may be conceded that there is strong ground for so suspecting; but, as against the entries plainly indicating the assessment of stock to the company without indicating it to be stock of a corporation other than that of the company, the court was not warranted in assuming from the similarity of the valuation of the bank shares that these were intended and

a. SAME: capital  
stock: assess-  
ment roll:  
description.

assessed rather than the company's stock. For all that appears, it may be mere matter of coincidence, or the assessor may have thought the bank stock and the company's capital stock of about the same value. The assessor's books plainly indicated the assessment of the capital stock, and the mere fact that the shares in the bank were of the same or nearly the same value, or that they do not appear elsewhere on the assessor's books, did not warrant the inference that these rather than the capital stock were assessed.

Nor were the assessments so inadequate that they should be regarded as none at all. The assessments were for substantial amounts, and the showing was such as to justify the conclusion that the assessor and reviewing board exercised their judgment honestly, though possibly erroneously, in estimating the value of the stock. Intentional fraud cannot be imputed to them, for the disparity between the assessment and the actual value was not so gross that it may not be attributed to honest misjudgment. See *County of Otter Tail v. Batchelder*, 47 Minn. 512, (50 N. W. 536); *Parker v. New Orleans Gaslight Company*, 44 La. Ann. 753, (11 South. 32); *State Board of Equalization v. People*, 191 Ill. 528, (61 N. E. 339, 58 L. R. A. 513).

We are of the opinion that the treasurer rightly concluded that the company's capital stock had been assessed, and for this reason ought not to be regarded as omitted property. *German Savings Bank v. Trowbridge*, 124 Iowa, 514; *Security Savings Bank v. Carroll*, 128 Iowa, 230; *People's Savings Bank v. Layman* (C. C.) 134 Fed. 635.

III. For the year 1904 the entries on the assessor's book are as follows: In the first column, under "Owners' Names," "First National Bank," with Farmers' Loan & Trust Company" immediately below, and, in the column headed "Corporation Stock," "Actual Value," directly opposite "First Na-

3. SAME: valuation of property: fraud.

4. SAME: valuation of property.

5. SAME: assessment of capital stock: evidence.

tional Bank," is "\$102,078." The treasurer found that this was an assessment of shares in the bank, and that the name of the company no more than indicated the owner of the stock. Though, with some hesitation, we are inclined to entertain the same opinion. The shares in the national bank owned by the company were assessable to it, and these do not appear to have been otherwise assessed. Moreover, the above amount is nearly the same as the value of the bank stock consisting of one thousand nine hundred and eight shares, according to the company's statement to the assessor for 1904, showing large deductions invested in real estate; its difference being less than \$400.

Some question is made as to whether these statements were shown to have been before the assessor. They purport to have been made to the assessor and furnished such infor-

6. SAME: state-  
ment by cor-  
poration:  
effect.

mation as is exacted by section 1323 of the Code, and, being in the nature of admissions, were properly considered by the treasurer whether ever before the assessor or not. And the statement of 1904 showed that, while the company had capital stock, surplus, and profits of the estimated value of \$915,000, it claimed deductions because of real estate holdings and property assessed in other taxing districts amounting to \$971,840. So that, if the statement was employed for the purpose it appears to have been prepared, the assessor, if he relied on it, must have concluded that the bank stock was all it had that was assessable in Sioux City and made no other. The treasurer rightly decided that the company's capital stock was not assessed for 1904.

IV. In the written opinion, the treasurer found the actual value of the capital stock in 1904 to have been \$564,626 and its taxable value \$141,156, but did not compute the amount of taxes or interest then payable. Within a reasonable time he entered the assessment in the tax list as \$41,923 taxable value and the amount of taxes owing as \$3,269.99, and

7. SAME: assess-  
ment by treas-  
urer: record.

for such amount the treasurer subsequently instituted suit against the company. Plaintiffs contend that in entering the \$41,923, instead of \$141,156, in the tax list, the treasurer acted illegally. This may depend on what constituted the final determination by the treasurer, for, if this be the entry in the tax list, he might correct or modify any previous finding or opinion so as to conform with the facts or law as he finally concluded in making the final entry. Moreover, the assessment as enacted by section 1374 of the Code, even if it might be made merely by writing an opinion, includes a finding of the amount of taxes and interest required, and, as said, the opinion contained nothing of the kind, while the entry in the tax list was complete. It is quite as important that records of such assessments be made as of assessments by other officers. The auditor is required to "transcribe the assessments of the several townships, towns, or cities into a book, to be provided at the expense of the county for that purpose, to be known as the tax list." Section 1383, Code. He may correct any error in the "tax list and may assess and list for taxation any omitted property." Section 1385-b, Code Supp. 1907. Section 1374 of the Code, authorizing the county treasurer to assess property withheld or omitted from taxation, does not prescribe in what manner such assessment shall be evidenced in the records of the county. In *Galusha v. Wendt*, 114 Iowa, 597, the demand for the amount for which the omitted property should have been taxed, with interest, on the delinquent taxpayer, was held to constitute the assessment necessary; but afterwards the Legislature enacted that: "Before listing the property discovered, the treasurer shall give the person in whose name it is proposed to assess the same or his agent ten days' notice thereof by registered letter addressed to him at his usual place of residence, fixing the time and place where objection to such proposed listing and assessment may be made." Section 1407-a, Code Supp. 1907. An appeal from the "final ac-

tion of the treasurer" is authorized. It is plain from this that the statute now contemplates the "listing and assessment" after the delinquent has been afforded an opportunity of being heard, and the language of the statute seems to exact an entry in the tax list by the treasurer either in the book delivered to him by the auditor or another kept for that purpose. It was said in *Re Morgan*, 125 Iowa, 247, that "the determination by him that the property has been omitted and his ascertainment of the amount thereof is taken as a substitute for the assessment required by the general provisions of the statute relating to that subject." How shall this be evidenced? There must be a listing of the property to be taxed in some form (*Judy v. National State Bank*, 133 Iowa, 252), and, as no other is specified, we think the Legislature must have contemplated that prescribed for listing assessed property generally. This supplies a permanent record which is in the interest of the taxpayer as well as the public. It follows that the entry in the tax list or other book kept for the purpose evidences the final determination of the treasurer. See *Snakenberg v. Stein*, 126 Iowa, 650. The action of the treasurer in entering in the tax list the capital stock at a lower valuation than indicated in the written opinion, in the absence of any showing of fraud or mistake, was not illegal.

V. No appeal by the county lies from the final determination by the treasurer in the matter of assessing omitted property. *In re Assessment of Farmers' Loan & Trust Co.*, 129 Iowa, 588. No claim is made

8. SAME: valuation of property by treasurer: review.

that he acted fraudulently. Even though the court in this proceeding might have found on reviewing the evidence that the assessment was too low, it could not have made a new assessment or increase that of the treasurer. *Farmers' Loan & Trust Co. v. Town of Fonda*, 114 Iowa, 728, and cases therein cited. The treasurer only was clothed with authority to determine the value

of the omitted property. In doing so, he exercised his judgment and discretion, and therein did not act illegally, even though he may not have reached a correct conclusion. It is well settled that an error of this character may not be corrected by certiorari. *Polk County v. City of Des Moines*, 70 Iowa, 351; *Brockway v. Board of Supervisors*, 133 Iowa, 293; *Tiedt v. Carstensen*, 61 Iowa, 334.

Many other matters are touched in argument, but enough has been said to dispose of the appeal. *Affirmed.*

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STATE OF IOWA, Appellee, v. C. P. BROWNING, Appellant.

**Malicious threats to extort: INDICTMENT: DUPLICITY.** The statute

1 relating to malicious threats to accuse another of an offense, or to do an injury to his person or property, with intent to extort money, covers several methods whereby the crime may be committed, but the acts constitute but one offense although stated disjunctively; and it is proper for an indictment to charge the crime as having been committed by one or all of the methods stated in the statute.

**Same: SUFFICIENCY OF INDICTMENT.** An indictment charging that de-

2 fendant unlawfully, maliciously and feloniously threatened to do injury by threatening to forcibly arrest and place in jail the parties named, with intent to extort money, sufficiently charges that the threat was of an unlawful arrest, over the objection that it might have been lawful; as the gist of the crime is the threatened injury to person or property with the view of gaining some pecuniary advantage, and it is immaterial whether the accused might or might not have made a lawful arrest, where the crime is committed in that manner.

**Witnesses: OATHS.** No particular form of oath to be administered

3 to a witness is prescribed, but if of such character as to be regarded by the witness as binding upon his conscience it is sufficient, although he may regard some other form as more solemn.

**Same: FORM OF OATH: OBJECTION.** Objection to the form of an oath

4 must be made previous to its administration or it will be deemed waived.

**Same: DISCREDITING EVIDENCE.** A witness can not be asked whether

5 he considers some other form of oath than that administered as more binding upon his conscience, for the purpose of discrediting him.

**Malicious threats: EVIDENCE.** On this prosecution for making an  
6 unlawful threat of arrest with a view of extorting money, defendant claimed that the parties making the charge were conducting a house of illfame and that one of them had offered sexual intercourse with accused just prior to the threatened arrest. *Held*, that evidence that the one claimed to have offered unlawful intercourse was sick at the time and the number and ages of her children was competent on that issue; but if this were not so no such prejudice resulted as would justify a reversal because of its admission.

**Malicious threats to extort: SUFFICIENCY OF INSTRUCTION.** Where  
7 the offense charged is simply malicious threats to extort, the element of bribery is not involved, and an instruction that the offense is complete if malicious threats were made with intent to extort money, or to compel the person thus threatened to do an act against his will, whether the person gave any money or not, was proper, and not subject to the objection that it does not sufficiently discriminate between bribery and malicious threats.

**Same: PROOF OF CONSPIRACY: INSTRUCTION.** On a prosecution of  
8 several defendants for malicious threats of arrest in order to extort money, proof of conspiracy without alleging the same in the indictment is proper, for the purpose of making each defendant liable for the acts of the other. And the language of the instruction in this instance is not objectionable as making defendant liable for the acts of his codefendants, pursuant to a conspiracy between them alone, but requires the finding of a conspiracy between the accused and all or part of his codefendants, to make their declarations made in his absence admissible against accused.

**Same: UNLAWFUL SEARCH: INSTRUCTION.** Where it appeared that  
9 defendant had no warrant authorizing him to search the residence of the person he is claimed to have threatened with arrest, any error in instructing that accused, as a special police officer, had no authority to serve a search warrant was not prejudicial.

**Same: UNLAWFUL ARREST: INSTRUCTION.** A private person has the  
10 right to make an arrest as a peace officer for a felony committed or attempted in his presence: So that an instruction that the accused, a special police officer, was not a peace officer and had no greater authority to make an arrest than a private person would have had, was not prejudicial to the accused, where it appeared that as a private person he had the same authority to make an

arrest as a peace officer would have had under the same circumstances.

**Malicious threats to extort: BRIBERY: DISTINCTION.** There is a distinction between malicious threats with intent to extort and bribery. If one whose duty it is to make an arrest suggests that for a price he will not do so, or if after arrest he offers to release the accused upon the payment of money or the doing of some act, this is not the crime of making malicious threats; but if one threatens to accuse another of a crime unless he pays money or does something else against his will, for the purpose of extortion, the crime is a malicious threat although it be followed by an arrest.

**Malicious threats: EVIDENCE.** The evidence in this prosecution for malicious threats with intent to extort money is held sufficient to support a verdict of guilty.

*Appeal from Polk District Court.*—HON. LAWRENCE DE GRAFF, Judge.

WEDNESDAY, NOVEMBER 15, 1911.

DEFENDANT with two others, was indicted for the crime of making malicious threats to extort money. Upon trial to a jury he was found guilty and given an indeterminate sentence to the penitentiary. He appeals. *Affirmed.*

*H. L. Bump and Stewart & Hextell*, for appellant.

*George Cosson, Attorney General*, and *John Fletcher, Assistant Attorney General*, for the State.

DEEMER, J.—Defendant was indicted for the crime defined in section 4767 of the Code, which reads as follows: "If any person, either verbally or by any written or printed communication, maliciously threaten to accuse another of a crime or offense, or to do any injury to the person or property of another, with intent to extort any money or pecuniary advantage whatever, or to compel the person so

threatened to do any act against his will, he shall be imprisoned in the penitentiary not more than two years or be fined not exceeding five hundred dollars.

The charging part of the indictment is as follows: "The said C. P. Browning, R. B. McKee, A. W. Rice, on or about the 14th day of August, A. D. 1910, in the county of Polk, in the state of Iowa, did willfully, unlawfully, maliciously, and feloniously threaten to do injury to the person of Fredia Cassman and Jacob Cassman, by threatening to forcefully arrest and place in jail the said Fredia Cassman and Jacob Cassman, with the intent then and there on the part of C. P. Browning, R. B. McKee, and A. W. Rice, to extort money from the said Fredia Cassman and Jacob Cassman aforesaid."

It seems to cover all the elements of the offense as described in the statute. It alleges that the said defendant maliciously and unlawfully threatened to do injury to the persons of others, naming them, by threatening to forcefully arrest them and to put them in jail, with the intent on the part of the defendants to extort money from them against their wills. It does not allege that the threats were verbal; but this is the fair inference from the indictment and sufficiently appears from the language used.

I. The statute, as it reads, covers several methods whereby the crime may be committed; but these acts constitute but the one offense, although stated disjunctively.

In framing an indictment under such a section, it is proper to charge the crime in any or all of the methods defined by the statute or to state its commission in one or all of the prohibited methods. The offense aimed at is malicious threats to extort. These threats may be to accuse another of a crime or to do an injury to the person or property of another, one or both, with intent to extort money or gain some pecuniary advantage, or to compel the person threatened to do an act against his will, and one

1. MALICIOUS  
THREATS TO  
EXTORT: in-  
dictment: du-  
plicity.

committing such acts or any of them is guilty of the offense charged.

The chief complaint made of the indictment is that it does not charge that the threat was of an unlawful arrest, that the threat might have been lawful or of a lawful arrest, and that this is not negatived in the indictment. We can not agree with this construction. The indictment does charge that defendant unlawfully, maliciously, and feloniously threatened to do injury by threatening to forcibly arrest and place in jail the parties named with intent to extort money. If the words used had been to accuse another of a crime, instead of to forcibly arrest, the indictment would have been in the language of the statute. This statute makes no express exceptions. That is to say, neither officers nor private persons are excepted from its terms, and it is apparent that one may be guilty under this section although he had the lawful right to arrest, or the duty perhaps of accusing another of a crime. It is misuse of these powers for malicious purposes and with intent to extort money which is aimed at, and one could not under any circumstances lawfully do the thing which defendant is charged with doing. That the indictment is sufficient, see *State v. Young*, 26 Iowa, 122; *State v. Lewis*, 96 Iowa, 286; *State v. Waite*, 101 Iowa, 377; *State v. Debolt*, 104 Iowa, 105; *Kennedy v. Roberts* 105 Iowa, 521.

II. Two of the witnesses for the state were Jews, and after taking the orthodox oath, which he stated he regarded as binding on his conscience, was asked by defendant's counsel as to whether or not there was any other form of oath which he regarded as of higher or greater sanctity or of greater solemnity or more binding upon him than the oath taken. Objections to the questions were sustained and of this complaint is made. At common law no particular form of oath was required. Any form was sufficient which was

2. SAME: sufficiency of indictment.

3. WITNESSES: oaths.

considered by the witness as binding on his conscience. *Gill v. Caldwell*, 1 Ill. 53; *Reg. v. Serva*, 2 Car. & K. Eng. 53, 1 Cox, Crim. Cases, 292.

The witnesses in this case did not object to the form of oath, and each stated that it was binding on his conscience. This was sufficient, although he might perhaps have regarded another form as more solemn, or more binding upon him, than the oath taken. In such cases the law does not deal with comparisons, but is satisfied if the witness regards the oath as binding upon his conscience. *Doss v. Bicks*, 11 Humph. (Tenn.) 431.

Even were this not so, no objection was made to the form of oath administered, and the questions propounded were evidently framed for the purpose of discrediting the witness. It is the universal rule that objec-

4. SAME: form of oath: objection.

tion to the form of oath must be made previous to its administration, or it will be deemed waived. *State v. Davis*, 186 Mo. 533, (85 S. W. 354); *Gonsales v. State*, 31 Tex. 495. For the purpose of discrediting the witness the inquiries were inadmissible.

*Searcy v. Miller*, 57 Iowa, 613; *Dedric v. Hopson*, 62 Iowa, 563; also, Const. article 1, section 4. If one understands the nature of an oath and assumes to take it as binding upon him, he is a competent witness. Code, section 4601; *State v. Rainsberger*, 71 Iowa, 746. See, also, *Pullen v. Pullen*, (N. J.), 4 Atl. 82.

5. SAME: discrediting evidence.

III. The state was permitted to show, over defendant's objection, that Mrs. Cassman was sick at the time it is claimed the threats were made, and also to show the

number and ages of the children of Mr. and Mrs. Cassman. In view of the developments upon the trial, we are constrained to hold

6. MALICIOUS THREATS: evidence.

these matters material and competent. It is claimed, at least inferentially, that the Cassmans were running a house of ill fame, that Mrs. Cassman had offered herself for

unlawful sexual commerce just prior to the acts complained of, and that she was in fact a prostitute. Upon these questions the testimony complained of had some relevancy and materiality.

But, even if this were not so, no such prejudice resulted to defendant as would justify a reversal. Some other rulings on the admission and rejection of testimony are complained of which we do not regard as of sufficient moment to justify separate consideration. It is enough to say that no prejudicial error appears.

IV. Many complaints are made of the charge as given by the trial court, and it is most strenuously argued that the testimony is insufficient to justify the verdict. In this connection it is argued that defendant's offense, if any, was bribery. As to this latter claim more hereafter.

The instructions most vigorously complained of read as follows:

(6) You are further instructed that the 'offense,' as defined by law and as charged in the indictment, is complete if malicious threats were made, as charged in the indictment, to the persons named therein, to wit, Fredia Cassman and Jacob Cassman with intent to extort money or to compel the persons so threatened to do an act against their will whether the person so threatened gave any money or not.

(7) You are instructed that under the law where a conspiracy is once established, and until the completion and consummation of the object in view, if the conspiracy lasts that long, every act and declaration of one conspirator in pursuance of the original concerted plan, done and in reference to any furtherance of the common object even in the absence of the other conspirator, is in contemplation of the law the act and declaration of them all, and is therefore evidence against each, and all are deemed to assent to or commend what is said or done by any of them in furtherance of the common object of the conspiracy.

In this case the court has admitted testimony as to the act and declarations of persons whom the state claims were coconspirators. Some of these acts and declarations were done and made not in the presence of the defendant.

Under the law herein given you will reject any testimony in regard thereto unless you find that the defendant, C. P. Browning, conspired and confederated with R. B. McKee and W. A. Rice or either of them, and that the statements and acts not made or done in the presence of the defendant, C. P. Browning, were in fact made by a person so conspiring and confederating with said defendant.

You are further instructed that a 'conspiracy is a combination between two or more persons by concert of action to accomplish some criminal or unlawful purpose, or some lawful purpose by a criminal or unlawful means. A conspiracy is complete when the conspirators enter into the agreement, and it is immaterial whether the agreement has been carried out or not.

You will carefully inquire and determine whether it is proven that a conspiracy existed between the defendant, C. P. Browning, and R. B. McKee and W. A. Rice, or either of them, and in so considering you are entitled to take into account all the evidence showing when and where and under what circumstances the defendant and said McKee and Rice or either of them were together, what was said by and between the said parties at the time or times they were together, if you find the fact so to be, and if you find the evidence that the defendant, Browning, and said McKee and Rice, or either of them, did so conspire, then you may consider the declarations and statements of the said McKee and Rice or either of them, if any were made, during the existence of such conspiracy in pursuance of or in furtherance of such conspiracy, in the absence of said defendant, Browning, as bearing upon the guilt or innocence of the said defendant, Browning; but, if such conspiracy is not proven, then you must not consider any statements, acts, or declaration of the said McKee and Rice, or either of them, not made or done in the presence of the said defendant, Browning. . . .

(9) A statute of this state defines an 'arrest' to be the taking of a person into custody when and in the manner authorized by law and may be made at any time of any day or night. It is also provided that an arrest may be made by a peace officer or by a private person. It is further provided that a peace officer may make an arrest in obedience to a warrant delivered to him, and without a warrant

for a public offence committed or attempted in his presence or where a public offense has in fact been committed and he has reasonable ground for believing that the person to be arrested has committed it. The statute further provides that a private person may make an arrest: First, for a public offense committed or attempted in his presence; and, second, when a felony has been committed and he has reasonable grounds for believing that the person to be arrested has committed it.

You are further instructed that the following persons are defined and designated by the statute as peace officers: First, sheriffs and their deputies; second, constables; and, third, marshals and policemen of cities and towns. A statute of this state further provides that a mayor of a city may in cases of emergency appoint such a number of special policemen as he may think proper, reporting such special appointment to the council at its next regular meeting, all such special appointments to continue in force until such meeting unless sooner terminated by the mayor.

Another statute of this state relative to search warrants and proceedings thereon defines a search warrant as an order in writing in the name of the state signed by a magistrate directed to a peace officer commanding him to search for personal property and bring it before the magistrate. It is further provided by statute that a search warrant may in all cases be served by any of the officers mentioned in its direction, but by no other person except in aid of the officer upon his requisition; he being present and acting in its execution.

Evidence has been introduced upon the trial of this case relative to the authority under which the defendant, Browning, acted at or about the time that it is alleged the malicious threats to extort took place. You are instructed that any evidence bearing upon the question of the authority of the defendant to act as a peace officer and in the execution of the service of the alleged search warrant at 319 East Fifth street, city of Des Moines, Polk county, Iowa, at the time and place in question, is to be considered by you as bearing upon the intent with which the defendant acted as substantially charged in the indictment, if you find he did so act, and for no other purpose.

You are instructed that as a matter of law the said

defendant was not at the said time and place a peace officer within the meaning of the law for the purpose of making service of search warrants duly issued from a court of competent jurisdiction. You are instructed, however, that as a private person he had authority to make an arrest for a public offense committed or attempted in his presence, or when a felony had been committed and he had reasonable ground for believing that the person to be arrested had committed it. You are instructed that the legal propositions herein stated and the evidence which has been introduced relative to the acts of the defendant under claim of authority as an officer, and what he did as shown by the evidence under the claim of being an officer, are not to be considered by you except so far as the same may throw light upon the intent with which the defendant acted, if you find he did act as substantially charged in the indictment.

In this connection the trial court was asked to give the following:

No. 1. The court instructs the jury that the only crime charged in this indictment is that of malicious threat to extort money, and that if from the evidence you believe that the defendant, C. P. Browning, did not have the specific intent to extort money from Jacob Cassman and Fredia Cassman, or either of them, then it is your duty to find this defendant not guilty of the crime charged in this indictment, notwithstanding that the motive and intent under which he did act at the time he made said arrest may have been reprehensible. . . .

No. 3. You are instructed that the threat to extort money must have been a malicious threat, and that malice is an evil disposition of the mind manifest in one of two ways: First, by personal hatred or ill will toward another; and, second, by a reckless and wanton disregard for the rights of others. And that if from the evidence you believe that when the defendant, C. P. Browning, arrested Jacob Cassman and Fredia Cassman, or either of them, he did so under the honest belief that the said Jacob Cassman and Fredia Cassman, or either of them, were conducting a house of prostitution or a disorderly house, then he was justified in making said arrest, and you must find he acted without malice within the meaning of the law.

No. 4. You are instructed that the defendant, C. P. Browning, was, on the 13th and 14th of August, A. D. 1910, a duly and legally appointed police officer of the city of Des Moines, with power to make arrests.

No. 5. You are further instructed that a peace officer may make an arrest in obedience to a warrant delivered to him, and without a warrant for a public offense committed or attempted in his presence, or where a public offense has in fact been committed and he has reasonable ground for believing that the person to be arrested has committed it.

Going now to the complaints of those given in the order of the instructions quoted, we find that the principal point made of the first instruction copied, to wit, No. 6,

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THREATS TO  
EXTORT: suf-  
ficiency of in-  
struction. has already been answered in our suggestions relative to the sufficiency of the indictment. One point made against it is that it does

not sufficiently discriminate between bribery and malicious threats to extort; that one assuming to be an officer or in fact one might be guilty of either or both offenses in the same or connected transactions must be apparent. The instruction itself has reference to malicious threats as distinguished from bribery, and there was no error in giving it.

The instruction relating to conspiracy, No. 7, was not improper. There was ample testimony to justify reference

8. SAME: proof  
of conspiracy:  
instruction. to the subject, and it was not necessary that a conspiracy be alleged in the indictment. Proof of a conspiracy was proper in order to hold defendant for the acts done by any of his codefendants or the other persons who may have acted with him.

The language of the latter part of the instructions is criticised because it is said that a jury might thereunder have found a conspiracy between McKee and Rice, defendant not being a party thereto, and yet by the language of the instruction held for anything either Rice or McKee may

have done in furtherance of their unlawful ends. We do not so read the instruction. The effect of it is to say that a conspiracy must be found between defendant and McKee and Rice, or between defendants and either McKee or Rice. The language will bear no other interpretation. The use of the word "either" in the instruction is full of significance, and to give any other construction to the language used one must abandon all grammatical rules and say in effect that the jury was justified in giving the instruction an interpretation which it will not reasonably bear.

Counsel's contention that a conspiracy is not defined is met by a reading of the instruction itself.

In the ninth instruction the court said that defendant was not a peace officer within the meaning of the law, and that he had no authority to serve a search warrant. This is bitterly complained of for the reason that it is an incorrect statement of the law. The question is largely a moot one, for, as will be seen, the defendant had no search warrant, nor did he serve one on the Cassmans.

But in *Foster v. Clinton Co.*, 51 Iowa, 544, and *Twinam v. Lucas Co.*, 104 Iowa, 231, opinions were filed which tend to support the position taken by the trial court. In the first case it was held that a special constable was not a peace officer, and in *Twinam v. Lucas Co.* it was held that a deputy marshal was not a peace officer in such a sense that he was entitled to compensation from the county for his services. In the opinion it is said: "The statutes do not define the duties of deputy marshals, nor do they fix their compensation. It may be assumed, however, that his duties are the same as those of the marshal. *Abrams v. Ervin*, 9 Iowa, 87. The marshal is a peace officer, and it is his right, as well as his duty, to arrest vagrants. This his deputy might also do, in the absence of any showing to the contrary." But it was further held that a deputy marshal was not a peace officer as that term is used in section

9. SAME: unlawful search: instruction.

4109 of the Code of 1873, which is now section 5099 of the Code of 1907.

Section 652 of the Code provides, in substance, that the mayor of a city may in cases of emergency appoint such number of special policemen as he may think proper, reporting such appointment to the city council at its next regular meeting, and that such appointment shall continue in force until such meeting unless sooner terminated by the mayor. Pursuant to this section the mayor made the following appointment of the defendant:

Appointment of Special Police. Mayor's Office, City of Des Moines, Polk County, Iowa. Des Moines, Iowa, July 6, 1910. On application Chief of Police ———, C. P. Browning is hereby appointed a special policeman at Des Moines and directed to report to the city marshal for instructions. The said C. P. Browning is to make no charge, nor is he to receive any compensation whatever from the city of Des Moines for service under this appointment. This appointment may be revoked any time at the will of the mayor. James R. Hanna, Mayor.

There is no other showing of revocation of this appointment than the following written across the face of the paper: Canceled by Mayor, October 27, 1910.

The times of meeting of the council of the city of Des Moines are not shown, and, if any inferences are to be made, they are that the appointment continued until canceled. There was also introduced in evidence a number of search warrants issued by one Conroy, a justice of the peace in and for Polk county, dated on the 12th and 13th days of August, 1910, and addressed to any peace officer of the state. None of these described Cassman's place, however, nor is there any return showing service of any by a search of that place. One of these warrants, which described a place nearest to the one occupied by Cassman, was returned by defendant as a special policeman "not served." So that in no event is it material to determine whether or

not defendant had authority to serve a search warrant. Even if he had such authority, he had no warrant which gave him authority to search Cassman's place, and the trial court did not err in stating that he had no authority to serve a search warrant. If any error be found, it is in the statement that defendant was not a peace officer and that he had no greater authority in making arrest than a private person.

Abstractly considered, this may be an erroneous view of the law; but, conceding the error, no prejudice resulted, if under the facts he had as a private person the same authority to make an arrest as a peace officer would have had under the same circumstances.

10. SAME: unlawful arrest; instruction.

A private person has the same right to make an arrest as a peace officer when a public offense has been committed or attempted in his presence. See Code, sections 5196, 5197.

The only power a peace officer has which is not possessed by a private person is that a peace officer may arrest where any public offense has in fact been committed and he has reasonable ground for believing that the person to be arrested has committed it, while a private person can only arrest in such cases where the offense is a felony. A "felony" in this state is an offense which is or may be punished by imprisonment in the penitentiary. Now under the testimony the only offense which the Cassmans or either of them was guilty of was adultery, which is a felony, or the keeping of a house of ill fame, which is also a felony. Even if the offense of Cassmans were prostitution, that, too, was a felony. The trial court in effect so instructed and properly told the jury that this was a collateral matter which might throw light upon the intent with which the defendant acted. There was no error in the ninth instruction prejudicial to the defendant, and it follows that the court did not err in giving the instructions asked by defendant in so far as they announce rules contrary to those already expressed.

V. The chief proposition relied upon for appellant is that the testimony shows the crime, if any, committed by him, was bribery, or an offer to take a bribe, and great reliance is placed upon *State v. Pierce*, 76 Iowa, 189. That there is a distinction between these offenses is manifest, and proof of one will not support the other. The soliciting of a bribe after an arrest or a threat of arrest is not extortion in a legal sense. Elliott on Evidence, section 2879, and *State v. Pierce, supra*.

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THREATS TO  
EXTORT: bribery: distinction.

But that one with authority to make an arrest may be guilty of threats to extort, even though an arrest is finally made, is equally clear. The arrest in such cases may be a part of the scheme to extort. *Com. v. Murphy*, 12 Allen (Mass.) 449. Much depends, of course, upon the facts of each particular case. If an officer whose duty it is to make an arrest suggests that for a price he will not make an arrest, as in *State v. Pierce, supra*, the offense is not the making of malicious threats to extort money, but an offer to accept a bribe. But if one threatens to accuse another of crime unless he pays a sum of money, or does something else against his will for the purpose of extortion, this is a malicious threat, although it be followed by an arrest. But if one, after having arrested another, offers to release him upon the payment of money or upon the doing of some other thing, this is not the crime of making malicious threats. These distinctions are plain, and the trial court pointed out the elements of the offense charged in its third, fourth, fifth, and sixth instructions, which are too long to be set out in this opinion. The distinctions we have attempted to draw were not set out in the charge as given by the court, but the defendant did not ask that any such instructions be given. The instruction as to arrest has already been quoted, and in other parts of the charge the necessary elements of the offense were properly defined.

There is no error in the charge of which defendant may justly complain.

VI. The close question in the case is the sufficiency of the testimony to justify the verdict. Some of the witnesses for the state were disreputable, and the stories told by one or more of them are hardly believable, and yet it appears that defendant and some of his associates were trespassers when they entered the Cassman home, and that the purpose of some of them in going there was not the highest. To a full understanding of the case it seems necessary to recite some more of the facts. It seems that defendant, who claimed to be a private detective, and who held an appointment from the mayor, as before stated, was employed by what is known as the Anti-Saloon League of Des Moines to ferret out and discover places where intoxicating liquors were being sold contrary to law. The object of this inquiry may have been directly for the good of society or indirectly to secure testimony upon which to remove certain peace officers or policemen of the city. Some, if not all, of defendant's associates were also employed for the same purpose. Two men, one by the name of Rice and another bearing the name of Van Nostrand, were also engaged in this same work as were McKee and Crowell; the two latter being employed by defendant. These parties, or some of them, were suspicious of Cassman's place, which was known as 319 East Fifth street, and a search warrant, issued August 13, 1910, against 311 East Fifth street, was placed in Browning's hands for service. That warrant commanded any peace officer to search the place described for intoxicating liquors. Rice and Van Nostrand went to the Cassman place once or twice in the early evening of August 13th, but were told to come again for the house was then being watched. This latter statement is denied by the Cassmans, who stated that Rice came to the house, but that he was inquiring for a room to rent. However this may be Rice

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THREATS: evi-  
dence.

again appeared on the morning of August 14th at about the hour of 4 a. m., was admitted to the house and was found in what was known as an alcove room with Mrs. Cassman. How he came to be there is a matter of dispute. He says that he was there by appointment to have intercourse with her according to an arrangement with her husband, while the Cassmans say that he came there to occupy the room as a lodger and that Mrs. Cassman arose from her own bed to prepare the one for Rice in the alcove so that he might occupy it when he (Rice) seized her and threw her on the bed. Whatever the truth this defendant and his associates secured access to the house shortly after Rice had entered it and as they entered found Rice with his coat off in the alcove and Mrs. Cassman, but partially dressed, either in the alcove or just emerging therefrom. Immediately upon the defendant's entering Cassman's rooms, Rice demanded of the Cassmans that they return him \$4 in money; that being the amount which it is claimed he paid Mrs. Cassman for the privilege of occupying the bed with her. Some controversy was had over the payment of this sum or any other, and the testimony for the state is that both Rice and defendant, and perhaps another, demanded the return of the money, or if it was not returned that they would arrest both the Cassmans and take them across the river, meaning either to the county or city jail. The Cassmans were obdurate, and, after an ineffective search of the house for intoxicating liquors was made, they were taken by the defendant and his associates over the river, and, after an ineffectual attempt to find the justice who issued the search warrant, the Cassmans with Rice were taken to the county jail and there turned over to the jailer, who kept them until 9 or 10 o'clock in the morning, when they were discharged. Some things were done toward their future arrest and punishment, the full extent of which is not disclosed by the testimony. There is also some testimony to the effect that, in addition to the demand for the

return of the \$4, defendant or some of his associates also said that no arrest would be made if the Cassmans returned the \$4 and also the further sum of \$10. The testimony also discloses that, after the Cassmans were taken to the west side of the river, the defendant or some of his associates offered to release the Cassmans if they would pay the \$4 and the \$10.

Such are the broad outlines of the case. The defendants each and all deny that any demands were made upon the Cassmans. They say that they went to the house for the double purpose of searching it for intoxicating liquor, believing that the warrant then in Browning's hands covered the place, and for the additional purpose of ascertaining whether or not the Cassmans were conducting a house of ill fame. There is enough in the testimony to justify the conclusion that all of the parties named were acting in conjunction, and that Rice was to make arrangements for entering the house and for such accommodations as would be proof indisputable that the house was a disorderly one, and that within a few minutes after he finally succeeded in gaining admission his associates should enter in the hope and belief that he would be found in a compromising position with some of the inmates. That he did gain admission and was in a suspicious situation with Mrs. Cassman when his associates entered is too clear for argument, and that he did pay Mrs. Cassman some money, the amount being in dispute, we have no doubt. We are also convinced that when his associates entered he demanded the return of the money on the theory that he had had no consideration therefor. There was considerable parleying over this matter, and finally the Cassmans were arrested and eventually lodged in the county jail.

The sharp dispute is upon the proposition as to whether or not defendant or any of his associates with whom he was acting demanded the return of the money paid by Rice or other sums and threatened that if they (the Cassmans) did

not return it they would be arrested and taken to jail. This is denied on the one hand and affirmed on the other. There is testimony to show that the demands, whatever they may have been, were before any arrest had been made and were subsequently reiterated as a condition for the release of the Cassmans from the arrest. Now while, as we have said, the witnesses for the state are disreputable, and some of their testimony almost unbelievable, the weight and sufficiency of the testimony was for a jury. If defendant had offered no testimony, a good case for the state would have been made out. By the introduction of testimony they produced a conflict in the evidence, and it was for the jury to settle this conflict and to determine the very truth of the matter. The case is not one where we should say that there is not sufficient testimony to justify a conviction without arrogating to ourselves a power which we do not possess. A reading of the record, however, satisfies us that the case is one which may properly be considered by the executive department of the state or the board of parole, and upon an independent investigation, which we cannot make, it may appear that such injustice has been done as to call for relief. Some of the testimony indicates that plaintiff's witnesses as a rule are of questionable character, and represent that strata of society which is a menace to any community. On the other hand, defendant and his associates resorted to questionable and highhanded methods to accomplish their ends. They had no authority to search the house, and their entry therein was a clear trespass. They deliberately planned whatever was done in the hope of discovering something wrong, and one of defendant's associates is quite as deeply in the mire as the Cassmans are in the mud. Sitting as an appellant court, we have no right to say, in the face of the verdict of the jury, that the case made for the state is a tissue of falsehood and perjury. That question was for the jury.

Our conclusion is that the judgment must be, and it is, *affirmed*.

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MARTHA FELKNER v. ORA FELKNER, Appellant.

**Divorce: CRUEL AND INHUMAN TREATMENT: EVIDENCE.** In this action for divorce, based on cruel and inhuman treatment, the evidence is reviewed and held sufficient to support a decree.

*Appeal from Appanoose District Court.*—HON. C. W. VERMILION, Judge.

FRIDAY, NOVEMBER 17, 1911.

**ACTION** for divorce. From a decree granting the relief prayed, and awarding plaintiff the permanent custody and control of the infant child and alimony for the care, support, and education of such child, the defendant appeals. *Affirmed*.

*Howell & Elgin*, for appellant.

*J. M. Wilson and C. R. Porter*, for appellee.

McCLAIN, J.—The grounds for divorce alleged in plaintiff's petition are that, although plaintiff has at all times conducted herself toward the defendant as a dutiful and loving wife, "the defendant, in total disregard of his vows of marriage, has been guilty of such cruel and inhuman treatment of plaintiff as to endanger her life; that he, within a few months of the marriage aforesaid, became cool and distant in his treatment and attention toward plaintiff, and would frequently make remarks in regard to plaintiff's condition, indicating a total absence of all love and affection, and seemed to desire to hold plaintiff up to ridicule, owing to her delicate physi-

cal condition; that defendant, within a few months after said marriage, would seldom, if ever, speak to plaintiff, and if at such times he did address himself to plaintiff it was in a short and formal manner, and would abuse the plaintiff at such times; that defendant, since a few months after the marriage stated above, has been uniformly unkind and unfeeling in his treatment of and regard for plaintiff, frequently intimating that he had no love or affection for plaintiff, and manifesting no interest in the society of plaintiff, and would refuse to take plaintiff to church or other social gatherings when requested to do so by plaintiff." It is further alleged that this course of treatment has had "a serious and ill effect on plaintiff's health to such an extent that her life was endangered thereby." It is also alleged that, not long before plaintiff's confinement, and with knowledge that it was soon to take place, defendant left her at the home of his father, and remained away until after the child was born, without making his whereabouts known to the plaintiff, or communicating with her. Defendant's motion for more specific statement of the grounds alleged in the petition was overruled, and a demurrer to the petition, on the ground that the facts stated therein were not sufficient to justify the court in granting the relief demanded, was also overruled. There was a trial on the merits, as the result of which a decree was granted to plaintiff, and defendant's appeal involves the action of the court in overruling the demurrer, as well as its action in granting the divorce on the evidence adduced. As there is no contention that the evidence went beyond the allegations of the petition, it will be sufficient for a disposition of the case that we determine the sole question whether the court erred in granting a decree to plaintiff.

The background of facts, as to which there is no substantial dispute, on which the parties attempt to build up their respective constructions of their relations to each other is briefly as follows: Plaintiff and defendant were married

in January, 1908, being each about twenty-three years of age; the plaintiff about two months older than the defendant. The courtship had extended over a period of three or four years. The parents of each owned and resided on large farms near Centerville and within a mile and a half of each other, and the acquaintance of plaintiff and defendant had commenced while they were living at the homes of their parents. Plaintiff had during the three years preceding the marriage been engaged as school teacher in Centerville, and defendant had worked on his father's farm until about six months before the marriage, when he attempted to conduct with his brother a feed store in Centerville on capital furnished by the father; but the enterprise was abandoned as a failure soon after the marriage. Returning from a short honeymoon, defendant took plaintiff to his father's home, where she assisted her mother-in-law in the housework, including the washing for her husband and his father and mother and at times a hired man, until after the 1st of October, when defendant's brother and his wife became members of the same common family. The defendant had no interest in the farm, nor partnership arrangement with his father as to the profits of conducting it, but with the general understanding that he was to receive \$20 a month continued to reside with his father and assist him on the farm. Plaintiff frequently visited her parents, usually being taken to their home by defendant or his father. In the latter part of December, defendant went to Kansas City, accompanying his mother part of the way on a journey which she took, in order to visit her sister in Nebraska, and at Kansas City defendant joined his brother and engaged in the purchase of some cattle for their father; the brother returning home almost at once, leaving defendant to make the purchases. On January 14th, plaintiff, being still at the home of her father-in-law, was confined and gave birth to a child, and soon after that, with the child, left her father-in-law's home and went to the home

of her parents, where she still resides, having custody of the child. The defendant made no effort to communicate with the plaintiff after leaving her on the trip to Kansas City, even after he was aware of the birth of the child, and has never made any effort since that time to induce the plaintiff to resume with him the relation of wife, nor to secure the custody of the child, nor contribute to its support. On the other hand, the plaintiff has been unwilling, since she finally left the home of her father-in-law, to resume the relations of wife to her husband.

Much testimony was introduced for each party, for the purpose of throwing upon the other the blame for an estrangement which confessedly had arisen not later than October. With reference to this estrangement and its causes, the testimony for the respective parties is throughout absolutely contradictory and irreconcilable, and, although in some respects, the showing for defendant seems to preponderate, it must be remembered that the plaintiff was living with her husband's people, all of whom seemed to be prejudiced against her, and we are inclined to treat the aggregation of witnesses as of little consequence in arriving at the truth.

The following incidents we regard as being fairly well established by the testimony of plaintiff, which is corroborated to some extent by that of her parents and her sisters. In May, when plaintiff disclosed to defendant the fact that she was pregnant, the defendant expressed dissatisfaction with that condition in rather emphatic and profane terms, and proposed that she take medicine with the object of producing a miscarriage, and afterwards he gave her medicine to take, which he led her to believe was intended to produce that result. She took one dose of this medicine, which made her sick, and she refrained from taking more of it, although, for the purpose of escaping his violent condemnation of her objections, she pretended that she was continuing to take it. On account of her objections, defendant

characterized her as a stubborn little fool, and criticised her for being "too damned sanctified to take medicine." After this incident, there was a coldness between plaintiff and defendant, although the grievance of plaintiff seems to have been chiefly that defendant did not furnish her a separate home, and she was required to assist in the housework of a large family. Plaintiff felt that she was being slighted by defendant and regarded with disfavor in her father-in-law's household, although no physical violence was offered her, and nothing was done to reflect upon her character as wife. When plaintiff returned about October 1st, after a two weeks' visit to her parents, she testifies that her advances towards her husband for more amicable relations were repelled, and from that time on he occupied a separate room. He refused to speak to her; they had no conversation at the family table; and they sustained toward each other an attitude of belligerency. When defendant left for Kansas City in December, he did not advise plaintiff that he was going, nor bid her goodby, and remained away without communicating with her until after her child was born. It appears that plaintiff had told defendant's mother and sister that she did not expect to be confined until early in February. It cannot, therefore, be said that defendant was voluntarily absent from plaintiff at the time of her confinement early in January; but after he learned of the birth of a child he made no effort to communicate with plaintiff, and did not return until she had, with her child, left her father-in-law's home and returned to her parents. Since that time defendant has taken no steps towards a reconciliation, has made no offer to assist in supporting plaintiff or the child, and seems content to allow plaintiff and the child to remain away from him. The majority of the court, giving some weight to the decision of the lower court, based upon the conflicting testimony of witnesses appearing before it, reaches the conclusion that the relations of the parties were such, due to defendant's

fault, that a continuance of the marital relations was calculated to seriously impair plaintiff's health, and this is a sufficient ground for granting a divorce. *Luettjohann v. Luettjohann*, 147 Iowa, 286; *Wheeler v. Wheeler*, 53 Iowa, 511; *Caruthers v. Caruthers*, 13 Iowa, 266; *Beebe v. Beebe*, 10 Iowa, 133.

The writer of this opinion would be better satisfied with a different result. He agrees with his associates in the view that the conduct of defendant in urging plaintiff to take medicine which he led her to believe was intended to produce a miscarriage was sufficient ground in itself for divorce, had plaintiff then, and as a consequence of such action on her husband's part, terminated the marital relation, and insisted that she would not subject her health and wellbeing to the consequences of any such conduct. But she condoned this specific offense by continuing to live with defendant, and his conduct in this respect seems not to have been further the subject of difficulty between them. The writer is unable to see anything in the record establishing such a course of conduct of defendant toward plaintiff as to imperil her health after the incident above referred to until in October, and he is strongly inclined to the belief that the return of the plaintiff, after an absence of two weeks at her parents' home, with every indication of a permanent abandonment of defendant, was not with the purpose of resuming marital relations, but in pursuance of a plan to maintain her status on legal grounds. It is shown beyond question that in October plaintiff and her parents consulted an attorney with reference to her rights, and the fact that defendant also consulted attorneys before he left in December for Kansas City simply illustrates the attitude of hostility which each party maintained towards the other. Under these circumstances, it is not strange that defendant should have failed to advise plaintiff of his intended departure, or that he should have made no serious effort to bid her an affectionate adieu. Soon after the

birth of plaintiff's child, she wrote defendant a letter, directed to his address as she ascertained it from a neighbor, which letter was registered, so that it could not be read by defendant without his returning to her a written acknowledgment of its receipt. This letter the defendant refused to receive, the reason now given by him being that he thought it was in the nature of a trap, and the writer is inclined to think that, although the letter contained protestations of affection and of a desire that defendant should return and resume conjugal relations, it was in fact written in order to assist in making out a case for divorce. The rather spectacular manner in which this letter was brought into court, unopened, by the plaintiff, and made a part of the record, seems to lend considerable support to this view. The writer is not therefore satisfied with the conclusions reached by his associates, and yet, as the whole question involved is one of fact, he does not feel justified in formally dissenting.

While the provisions for alimony and support of the child involve an aggregate payment in statements of a considerable sum, the monthly payments are not unreasonable. We see no occasion to modify the decree in this respect.

The judgment of the trial court is therefore *affirmed*.

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J. M. BELL, Appellant, v. J. V. KEARNS.

**Contract of employment: WAGES: EVIDENCE.** In this action upon the counterclaim of a clerk for services, against his employers account for goods sold him, the fact that he failed to demand payment from time to time of the excess of his wages over the employee's account, and that he credited himself with cash paid out for the employer when the employer was owing him, were for the consideration of the jury, as against the contention of the employer that there was a contract for compensation by which he was entitled to payments prior to the expiration of his service, although not conclusive of the controversy.

**New Trial:** INADEQUACY OF VERDICT: WHO MAY COMPLAIN. The fact  
2 that the jury did not allow defendant on his counterclaim as much as he was entitled to under the instructions and the evidence is not a matter which the plaintiff can urge in support of a motion for new trial, on the theory that the verdict returned indicated prejudice and passion.

*Appeal from Hamilton District Court.*—HON. R. M. WRIGHT, Judge.

SATURDAY, NOVEMBER 18, 1911.

ACTION to recover balance due on account. Defendant interposed a counterclaim for services rendered to plaintiff on a contract for an agreed compensation. There was a verdict for defendant, and plaintiff appeals. *Affirmed.*

*D. C. Chase*, for appellant.

*Wesley Martin*, for appellee.

McCLAIN, J.—In August, 1904, plaintiff purchased from one Sketchley a grocery business, which he conducted thereafter, with the assistance of defendant as clerk, until in November, paying defendant for his services \$20 for the first month (the amount which he had been previously receiving per month from Sketchley), and thereafter \$25 per month. In November it was arranged that defendant should secure other employment, with some indefinite understanding that he might be reemployed by the plaintiff in the spring following. In May defendant reentered plaintiff's employment as clerk, having in the meantime become indebted to the plaintiff for groceries furnished. The testimony of the plaintiff and that of defendant as to what the arrangement for compensation was at this time cannot be reconciled. Plaintiff testified that nothing was then said as to the rate of compensation, and the court gave an instruction, not complained of, to the effect that if there

was no new arrangement defendant was entitled to compensation at the rate of \$25 per month. Defendant testified that his proposition, accepted by plaintiff, was to work for \$1.50 per day, if plaintiff continued to charge him retail price for groceries furnished; and the court instructed the jury that if they found for defendant on this issue they should allow the counterclaim. The arrangement between plaintiff and defendant, whatever it was, continued for more than two years without any formal settlement. When defendant finally left plaintiff's employment, plaintiff claimed a balance on account of about \$57, allowing defendant for his services at the rate of \$25 per month. Defendant then claimed a balance for services, over and above his indebtedness to plaintiff for groceries, in the sum of about \$363. The court left it to the jury to say whether they should return a verdict for plaintiff in the amount of his claim, or for defendant in the amount which he claimed in excess of plaintiff's account against him. The jury returned a verdict in favor of defendant for \$132.31, and the plaintiff asked for a new trial, on the ground that the verdict was contrary to the evidence and the instructions of the court. This motion being overruled, plaintiff now contends that there was no substantial evidence to support a verdict in defendant's favor, and that if a verdict was properly returned for defendant it should have been, under the court's instruction, for more than \$400, including interest; and that the verdict for defendant for a smaller amount was contrary to the court's instructions, and the result of passion and prejudice.

I. The question as to the credibility of plaintiff and defendant as witnesses in those respects in which they contradicted each other was necessarily for the jury. The failure of defendant to ask payment from the plaintiff, from time to time, of the excess of his salary over the amount of plaintiff

1. CONTRACT OF  
EMPLOYMENT:  
wages: evi-  
dence.

against him for groceries was for consideration by the jury, as against his contention that there was a contract for compensation, under which he was entitled to payments long before the expiration of his term of service, but it was not conclusive. Neither was it conclusive that in two instances he credited himself with cash paid out on plaintiff's account, when, according to his own testimony, money was owing him from plaintiff. His explanation that these two small cash payments were in the nature of advances to cover items of expense in the business which he did not have cash on hand, belonging to plaintiff, to meet may have been regarded by the jury as satisfactory. The verdict is not so far without support in the evidence as to require us to interfere with the finding of the jury.

II. Plaintiff's most serious contention is that under the instruction of the court, if the jury found for defendant, they were required to find a larger verdict than that returned, and that therefore the verdict as returned is contrary to the court's instructions, and must have been the result of passion and prejudice. In support of this contention, counsel cites *Fawcett v. Woods*, 5 Iowa, 400, in which case it was held on defendant's appeal that a verdict for plaintiff in an amount which in effect disallowed defendant's counterclaim to such extent as to be without support in this respect in the evidence should be set aside. But it is to be noticed that in the case cited the defendant was complaining of a failure to award him such damages as he was on the evidence clearly entitled to recover. In the case before us the verdict of the jury on an issue of fact raised by the counterclaim was for defendant, and plaintiff's contention, as appellant, is that the jury did not allow defendant as much as he was entitled to recover on his counterclaim, under the instructions and evidence, in view of the finding of the jury in defendant's favor. It is not for plaintiff to object on appeal that the jury should have returned a larger

2. NEW TRIAL:  
inadequacy of  
verdict: who  
may complain.

verdict against him. Defendant might consistently have complained of the verdict, and no doubt on his appeal it would have been set aside, and a new trial granted, in which the entire question of fact could again have been investigated. See, as somewhat in point, *Talty v. Atlantic*, 92 Iowa, 135; *Tathwell v. Cedar Rapids*, 122 Iowa, 50. But, as defendant is satisfied to let the verdict stand, plaintiff is entitled to no relief, unless it is on the theory that the inadequacy of the allowance to the defendant shows passion and prejudice on the part of the jury in finding any verdict whatever in defendant's favor. The fact that the jury returned a verdict which, in the opinion of the court, is not justified under the evidence as to the amount allowed does not necessarily indicate such passion and prejudice as to require the setting aside of the verdict and the granting of a new trial. If there is error as to the amount, it may be corrected by the court to this extent, that if the successful party will submit to a reduction, so far as the court deems necessary, a new trial will be refused. *Baxter v. Cedar Rapids*, 103 Iowa, 599; *Knowlton v. Des Moines Edison Light Co.*, 117 Iowa, 451; *Ahrens v. Fenton*, 138 Iowa, 559. We reach the conclusion in this case that the failure of the jury to render a verdict for the full amount of defendant's claim does not necessarily indicate passion or prejudice as against the plaintiff, entitling him to have the verdict set aside.

The judgment is therefore *affirmed*.

CONFIRMED

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S. B. RICHARDS, Appellee, v. W. H. HELLEN & SON, W. H. HELLEN and B. H. HELLEN, Appellants.

**Replevin: COUNTERCLAIM.** A counterclaim can not be pleaded to an action of replevin, and when so pleaded should be stricken on motion. Moreover the counterclaim pleaded in this case was based on a failure of consideration predicated on a claim for

nondelivery of property not described in any contract under which the property replevined was shown to have been sold, and was therefore insufficient and was properly stricken.

**Contract:** CONSIDERATION. A contract made as a substitute for prior  
2 agreements which are abandoned and rescinded is supported by a good consideration. That one member of a partnership was a minor at the time of making a partnership agreement is no defense to an action based upon the contract; especially where no personal liability is sought and there is no showing of disaffirmance.

**Replevin:** ALLEGATIONS OF TITLE: VARIANCE. An allegation by the  
3 plaintiff in an action of replevin that he is the absolute and unqualified owner of the property will not preclude his recovery under proof of a conditional and qualified ownership, where he has also pleaded the exact nature of his title, which is in conformity with the proof.

**Partnership:** IDENTITY OF PARTNERS: WHEN IMMATERIAL. Where no  
4 personal judgment is sought against any individual partner the question of whether a certain person is a member of the firm is immaterial; and a failure to identify him as a partner will not preclude recovery against the partnership.

**Same:** DENIAL OF PARTNERSHIP. In replevin based on a partnership  
5 contract defendants can not deny the fact of partnership; and where the petition charging a partnership is not denied, as required by statute, the plaintiff is not called upon to prove that any particular person is a member of the partnership.

**Replevin:** NATURE OF ACTION. The action of replevin involves the  
6 right simply to possession of the property at the time the action is brought; and this right is not dependent solely upon ownership, as the action may be maintained even against the true owner.

**Same:** CONDITION PRECEDENT. Where a contract for the sale of  
7 property provided for a retention of the title in the seller until payment of the price, with a right to possession on default, and contained no provision for a return of that part of the price already paid as a condition precedent to the right to retake possession on default, the seller has such a present right of possession as will entitle him to bring an action of replevin without tendering back that part of the price paid.

**Same:** LIABILITY OF DELIVERY BOND: VALUE OF PROPERTY. Where the  
8 plaintiff in replevin, on an entry of judgment in his favor, elects to have a return of the property and secures execution for that purpose which is returned unsatisfied because of a destruction

of the property, he is then entitled to judgment against the sureties on defendant's delivery bond, providing for its return, for the value of the property at the time of the commencement of the action.

**Same:** JUDGMENT: VALUE OF PLAINTIFF'S INTEREST IN THE PROPERTY.

9 Although the court in rendering judgment on the bond in this case failed to find the value of plaintiff's interest in the property, still defendants, having conceded that it was to be as much as the recovery, can not complain of the judgment rendered.

*Appeal from Hamilton District Court.*—HON. CHAS. E. ALBROOK, Judge.

SATURDAY, NOVEMBER 18, 1911.

ACTION for replevin. Verdict for plaintiff and judgment on a delivery bond given by the defendants. Defendants appeal. *Affirmed.*

*Wm. Whisler, G. D. Thompson and D. C. Chase, for appellants.*

*Boeye & Henderson, for appellee.*

DEEMER, J.—Plaintiff commenced an action of replevin against the defendants, who it is alleged were a partnership, to recover the possession of a job and newspaper printing plant, basing his claim thereto upon a contract between the parties, the material parts of which are as follows:

This article of agreement, made and entered into this 17th day of March, A. D. 1908, by and between S. B. Richards, of Hamilton county, Iowa, party of the first part, and W. H. Hellen & Son, of Hamilton county, Iowa, parties of the second part. Whereas, the party of the first part has this day sold to the parties of the second part the following described property, to wit: (Here follows a description of the property), for the sum of seven hundred fifty dollars, payable as follows, to wit: Fifty dollars on the 15th day of April, 1908, two hundred fifty dollars on

the 15th day of September, 1908, and four hundred fifty dollars on or before March 17, 1909, with interest at the rate of 6 percent per annum, as evidenced by four promissory notes of even date herewith: It is agreed between S. B. Richards and W. H. Hellen & Son that the title to the above described property is in S. B. Richards and that it shall remain the property of S. B. Richards until the above-described notes shall have been fully paid, and that in default of any of the payments of said notes as they become due, said property may be taken possession of by the said S. B. Richards, or any of his agents or assigns without process. S. B. Richards. W. H. Hellen & Son.

This contract was duly acknowledged and recorded. It is alleged in the petition that under this contract plaintiff remained and was the sole and absolute owner of the property. He also alleged that the \$450 payment under the contract became due March 17, 1909; that no part of the same had been paid; that notes representing this amount were yet in plaintiff's hands; and that he was the owner thereof. He also pleaded that he had demanded payment from the defendants, which was refused, and that he had also demanded the return of the property, which was likewise refused. Claim of \$50 in damages was also made. A writ of replevin issued on June 25, 1909, the day the petition was filed, and the writ was delivered to an officer for service who returned that defendants had executed to him a sufficient delivery bond and for that reason he did not take the property under the writ. This delivery bond was signed by defendant Hellen & Son as principals and by William Whisler and A. O. Carr as sureties. In due course defendants filed an answer to the petition, in which they pleaded an absolute purchase of the property, under another and prior contract, and possession of the property under that contract. They also pleaded false representations made by plaintiff inducing the sale and failure to deliver some of the property purchased. Damages to the amount of \$450 were alleged as satisfaction of any amount

due and owing the plaintiff under any contract. They also pleaded that defendant B. H. Hellen was a minor when the contract referred to in plaintiff's petition was executed, and that he had knowledge thereof. It is further alleged that this contract was wholly without consideration. As a part of the answer defendants set out a memorandum agreement for the sale of the printing plant for the sum of \$750 and averred this was the real contract between the parties. On plaintiff's motion that part of the answer pleading damages for false representations and for failure to deliver certain goods was stricken, and motion was also made to strike out all that part of the answer pleading the minority of B. H. Hellen and the allegation that the contract relied upon by plaintiff was without consideration. It does not appear what ruling, if any, was made on this latter motion.

Complaint is made of the ruling striking out the claim for damages. In it we find no error. The  
1. REPLEVIN: counterclaim. statute says that a counterclaim cannot be pleaded to an action of replevin. Code, section 4164.

Again, the part of the answer stricken, in so far as it was based upon failure of consideration, is largely predicated upon an oral agreement not embodied in the writing, and a claim for nondelivery of property which is not described in any of the contracts. The mere suggestion of this latter point is enough to justify the ruling of the trial court. Upon the remaining issues the case was tried to the court, a jury being waived, resulting in a finding that plaintiff was entitled to the possession of the property at the time of the issuance of the writ of replevin, and that its value at the time the action was commenced was \$450. Plaintiff then elected to take execution for the specific property described in the petition. Special execution issued at once, which was returned with a statement from the officer that the property described therein had been destroyed by fire and could not be levied upon, and that for this

reason he returned the execution unsatisfied. Thereupon plaintiff moved for judgment on the delivery bond for the sum of \$450, against the principal and sureties. This motion was sustained, and plaintiff had judgment against the sureties for the sum of \$450 with 6 percent interest from the date of the entry of this judgment. No exception to this judgment seems to have been taken by the sureties, and there seems to be no exception to this last judgment as it appears of record by the defendant. There is little, if any, dispute in the facts, and the questions presented are largely of law.

The printing outfit was sold by plaintiff to defendant in the spring of 1908, for the agreed sum of \$750; the purchase price to be paid in cash. Under this agreement the property was delivered to defendants and demand was made for the payment of the consideration. Defendants did not pay to exceed \$50 in cash, and this was all they could pay at that time. In view of this situation, plaintiff agreed to accept the \$50 in cash and eight notes maturing at different times amounting in the aggregate to \$700. Thereupon the contract or memorandum agreement referred to in defendants' answer was entered into between the parties. Defendants did not pay the eight notes as agreed, and it was finally agreed to cancel and rescind all prior contracts and to substitute a new one and also to give new notes for the \$700 of the purchase price. This was followed by the making of the contract referred to in plaintiff's petition, and which is the basis of this action. The \$250 note referred to in that contract was paid; but nothing more, save the original cash payment of \$50, has been received by plaintiff. Plaintiff made proper demand for the payment of the notes maturing March 17, 1909, and also of the property covered by the contract.

It is apparent that the contract on which plaintiff relies is based upon a good consideration; that is to say, it was executed as a substitute for prior ones, and the

prior agreements were abandoned and rescinded. That this is a sufficient consideration is hornbook law.

2. **CONTRACT:**  
consideration. See Page on Contracts, vol. 3, section 1344; Bishop on Contracts, sections 813-816.

In this connection it is said that the last contract is invalid because one of the partners, to wit, B. H. Hellen, was a minor at the time the contract was made. That such fact is not a defense for the partnership in such an action as this is also so well settled that it is hardly necessary to cite authorities. Shumaker on Partnership, page 88, and cases cited. No personal liability was sought against the minor in this action, and there is no showing that he ever elected to disaffirm. So much as to the minor points in the case.

Appellants' chief contentions are that plaintiff is not entitled to the property or to a judgment for the value thereof without returning to the defendants the amount he received from the defendants thereon. This contention is based upon two propositions. One is that plaintiff has elected to rescind the contract and is bound to return what he received thereunder, and the other is that the contract is one of conditional sale or made as security for a debt, and that plaintiff cannot keep the money he has received under the contract and also take the property back, or have judgment for its value. There is no merit in the first proposition because it has no support in the facts. Neither the pleadings nor the evidence adduced by plaintiff shows a rescission of the contract; but, on the contrary, reliance is based upon the contract as written, and plaintiff's action is bottomed upon the rights given him by the contract itself. No rescission was shown.

Closely allied to this first proposition is another contention, that, as plaintiff alleged he was the absolute and unqualified owner of the property, he is not entitled to recover because the testimony shows his ownership was conditional and qualified and that in no event is he entitled

to judgment for more than will make him whole. True there is an allegation of sole and absolute ownership; but this statement as made is a conclusion because it is asserted that it was in virtue of the contract set out *in extenso*. The exact nature of plaintiff's title was pleaded, and this is all that defendants were entitled to.

3. REPLEVIN: allegations of title: variance.

Again, it is insisted that there is no proof that B. H. Hellen was a member of the firm of W. H. Hellen & Son. This contention is also without merit for the reason that, in so far as this action is concerned, it makes no difference whether he was a partner or not. No personal judgment was asked or rendered against him.

4. PARTNERSHIP: identity of partners: when immaterial.

Moreover, the action is against some partnership which entered into a contract with plaintiff under the name of W. H. Hellen & Son, and it does not lie in the mouth of these defendants to say there was in fact no such partnership. If personal liability of B. H. Hellen were insisted upon, there might be some reason for arguing as to whether or not he was a partner, but that is not insisted upon here.

5. SAME: denial of partnership.

Again, the petition charges a partnership, and there is no such denial of that allegation as the statute requires. See Code, sections 3627, 3628.

Coming now to the second or the main proposition relied upon, we find some conflict in the authorities, although the conflict may be more apparent than real. The question in a replevin action is the right to the possession of the property at the time the action is brought. See *Campbell v. Williams*, 39 Iowa, 646; *Waterhouse v. Black*, 87 Iowa, 317; and other of the many cases cited in annotations to Code, section 4163. The gist of the action is the wrongful detention of the property. *Draper v. Ellis*, 12 Iowa, 316. Ownership is not essential to enable one to recover possession. One having the right

6. REPLEVIN: nature of action.

to present possession may maintain an action even against the true owner. *McCoy v. Cadle*, 4 Iowa, 557; *Goldsmith v. Willson*, 67 Iowa, 662; *Harvey v. Pinkerton*, 101 Iowa, 246. In *Beroud v. Lyons*, 85 Iowa, 482, it is said: "It is contended that these issues involved the right of the defendant to foreclose the mortgage, and the amount due thereon, and hence that this action was a transfer of the proceeding to foreclose to the district court, as provided in section 3317 of the Code, and was therefore cognizable in equity. We do not think the bringing of this action had the effect of transferring the proceeding of foreclosure to the district court. It is plain that under said sections 3225 and 3226 the controlling question to be determined is the plaintiff's right to possession, and that the defendant is entitled to no relief in such an action except judgment for the return of the property and the value of his right therein where it has been wrongfully taken from him by the writ."

Under the facts disclosed by this record, the trial court was justified in finding that plaintiff was entitled to the present possession of the property under his contract with the defendants, and, as the final judgment was for no greater amount than the sum due the plaintiff, there was no error, unless it be found that in this suit defendants were entitled to a return of the money paid.

We do not think that question necessarily arises in a replevin action and may go so far as to say that, unless return of the money paid was a condition precedent to plaintiff's right to possession of the property, the matter of the right to a return of the money paid cannot be investigated in this action. As already suggested, the plaintiff did not rescind the contract, but is relying upon it and has elected to retake the goods. This he had an undoubted right to do, and he was not required, as a condition precedent, to return any part of the purchase price already received. Having recieved the goods, his duties with respect thereto

7. SAME: condition precedent.

may be a subject of controversy; but we have not reached that stage in this proceeding. See *Fleck v. Warner*, 25 Kan. 492; *Tufts v. D'Arcambal*, 85 Mich. 185, (48 N. W. 497, 12 L. R. A. 446, 24 Am. St. Rep. 79); *Latham v. Sumner*, 89 Ill. 233, (31 Am. Rep. 79); *White v. Oaks*, 88 Me. 367, (34 Atl. 175, 32 L. R. A. 592); *Ryan v. Wayson*, 108 Mich. 519, (66 N. W. 370.)

Statutes in some states require a tender of the money paid. See Mechem on Sales, section 629. But we have no such statute. So that we have no occasion to determine whether the defendant would have any remedy in equity after plaintiff obtained possession of the property or judgment for its value. See, as supporting these conclusions, *In re Wise*, 121 Iowa, 359; *National Cash Reg. Co. v. Zangs*, 127 Iowa, 710; *National Cash Reg. Co. v. Schwab*, 111 Iowa, 605; *Flaherty v. Ginsberg*, 135 Iowa, 743; *National Cash Reg. Co. v. Maloney*, 95 Iowa, 573.

None of the many cases cited and relied upon by appellant are in point. They have reference to the right of the seller to recover the purchase price after retaking the property, a proposition which is not here involved. *Soda Fountain Co. v. Dean Drug Co.*, 136 Iowa, 312, is manifestly not in point. On the contrary, it supports the conclusions on this branch of the case.

Lastly, it is argued that plaintiff was not entitled to a money judgment against the sureties on the delivery bond, and that, even if this be not true, he was not entitled to judgment for the value of the property at the time of the bringing of the action. His contention here is that the judgment should have been for the value of the property at the time of the rendition of the judgment. Still pursuing this thought, he says that there is no testimony as to the value of the property at the time the money judgment was rendered. Turning again to the statement of facts, it will be observed that plaintiff did not elect to take a money judgment for the

8. SAME: liability of delivery bond: value of property.

value of the property, as plaintiffs did in *Gerlaugh v. Ryan*, 127 Iowa, 226, and other like cases. He secured execution for the return of the specific property, and, as he was unable to secure it, he then filed a motion for judgment against the sureties on the bond. The trial court found the value of the property at the time the action was commenced, and also found that plaintiff was entitled to the possession of the property at that time. The primary judgment against the defendants was for the return of the property, and special execution was ordered, and, when it was discovered that the property could not be found, judgment was asked on the delivery bond for the value of the property. Judgment was rendered on this motion against the sureties on the bond for the sum of \$450 with interest from the date of judgment and not from the time the action was commenced. No exception was taken to this ruling by the sureties, and it is doubtful if the defendants took an exception. But, however this may be, we do not think there was any error of which defendants may complain. The value of the property was fixed as of the time when the action was commenced, and no interest was allowed thereon. In *Sheffield v. Hanna*, 136 Iowa, 588, it is said that plaintiff in replevin is entitled to judgment for the value of the property at the time when it was wrongfully taken, or at least from the date when the suit to recover was commenced. See, also, *Colean Co. v. Strong*, 126 Iowa, 598; *Powers v. Benson*, 120 Iowa, 428; *Newberry v. Gibson*, 125 Iowa, 575. We see no reason why a different rule should prevail where judgment is rendered on a delivery bond. The condition of a delivery bond is to return or deliver the property to the plaintiff, if he recovers judgment therefor, in as good condition as it was when the action was commenced. Code, section 4172. This, to our minds, authorizes the court to find the value of the property at the time of the commencement of the action. The destruction of the property by fire did not release the sureties. *Hink-*

*son v. Morrison*, 47 Iowa, 167; *Lillie v. McMillan*, 52 Iowa, 463.

The following sections of the Code are material upon this proposition:

The judgment shall determine which party is entitled to the possession of the property, and shall designate his right therein, and if such party have not the possession thereof, shall also determine the value of the right of such party, which right shall be absolute as to an adverse party, and shall also award such damages to either party as he may be entitled to for the illegal detention thereof. If the judgment be against the plaintiff for the money value of the property, it shall also be against the sureties on his bond. Code, section 4176.

If the party found to be entitled to the property be not already in possession thereof by delivery under the provisions of this chapter or otherwise, he may at his option have an execution for the delivery of the specific property, or for the value thereof as determined by the jury, and if any article of the property cannot be obtained on execution, he may take the remainder, with the value of the missing articles. Code, section 4178.

When property is not forthcoming to answer the judgment, and for which a bond has been given as hereinbefore provided, and the party entitled thereto so elects, a judgment may be entered against the principal and sureties in the bond for its value. Code, section 4179.

Under these sections no complaint can be made of the judgment entered in this case. The value of the property at the time of the trial was *nil*, for it had been destroyed, and, as the condition of the bond was to deliver in as good condition as when the action was commenced, the plaintiff was not required to offer other proof than of its value at the time when the action was commenced. No case holds the contrary, and, if it did, we should hesitate to approve it. Plaintiff followed the proceedings outlined by the statutes quoted and was entitled to the judgment he received.

One other thought in this connection. While the trial

court did not find the value of plaintiff's interest in the property, it is conceded that this was at least \$450, which

9. SAME: judgment: value of plaintiff's interest in the property. was the value of the property. Plaintiff's final recovery was for no more than the value of his interest in any event, and defendants are in no position to complain. *Frazier v.*

*Hill*, 123 Iowa, 116. Our conclusions find support in *Gerlaugh v. Ryan*, 127 Iowa, 226. *Bonnot v. Newman*, 109 Iowa, 580, is not in point, for in that case plaintiff elected to take a money judgment, and there was no question as to the extent of the liability of the sureties on a delivery bond.

We find no error in the record, and the judgment must be, and it is, *affirmed*.

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A. J. SWANSON, Plaintiff and Appellee, v. FT. DODGE, DES MOINES & SOUTHERN RAILROAD COMPANY, Defendant and Appellant.

**Appeal: AMENDED ABSTRACT: DILIGENCE.** Where the appellant, after  
1 the filing of a motion to affirm the judgment on the ground that the shorthand notes were not filed in time, had the record below corrected to show that the notes were filed during the trial term and soon thereafter filed an amended abstract showing that fact, though only a short time before the date for submission of the case, such lack of diligence was not made to appear as to justify striking the abstract and affirming the judgment on motion.

**Railroads: NEGLIGENT CONSTRUCTION: DRAINAGE: EVIDENCE.** In this  
2 action plaintiff claims defendant company so constructed its road-bed as to destroy the efficiency of his tile drain thereunder. The defendant pleaded affirmatively that the road was constructed by an independent contractor, and that if there was any negligence it was chargeable to him, and introduced in evidence the construction contract. *Held*, that the contract was not conclusive against plaintiff, not a party to it, but that the question of whether the road was constructed by the contractor was properly submitted, as plaintiff was entitled to meet it by other evidence; and especially so as the contract on its face was incomplete because calling for construction in accordance with specifications to be thereafter pre-

sented and attached to the contract, which was not shown to have been done; and because the work was to be done under the supervision of defendant's engineer and was in fact supervised by him; that plaintiff claimed damages for continuing injury to the drain by exposure of the tile to the action of frost; and the further fact that the evidence as a whole showed that defendant acquiesced in the work of construction.

**Same:** NEGLIGENT CONSTRUCTION: WAIVER OF DAMAGES. A release  
3 of all damages to land by reason of constructing, operating and maintaining a railroad thereover, in an ordinary right of way deed, applies only to such damage as results to plaintiff from a proper and reasonable construction and maintenance of the road; it does not apply to damage arising out of negligent construction or breach of the condition upon which the deed was delivered.

**Same:** EVIDENCE. While the evidence in this action that plaintiff's  
4 title was destroyed by the action of frost is meagre, yet it is held sufficient to make a *prima facie* case on that issue.

**Same:** PRIVATE CROSSINGS: WAIVER OF EVIDENCE. On the question  
5 of whether plaintiff waived his right to a private crossing protected by cattleguards and gates by asking for two crossings, which were constructed without such guards, the evidence is in conflict and such that the issue was properly submitted to the jury.

**New trial:** MISCONDUCT IN ARGUMENT: SUFFICIENCY OF RECORD. In-  
6 corporation in the recitals of a motion for new trial of alleged improper argument of counsel is not sufficient to make the language a matter of record as a basis for exception thereto; but where objection to language was made during the argument and the particular language was recited into the record with the objection, a sufficient record to show the ground of objection and the particular language objected to was made.

**Same:** APPEAL: DISCRETION: PREJUDICE. The granting of a new trial  
7 on the ground of misconduct in argument is largely a matter of discretion; and when asked to reverse the ruling the appellate court must not only find that the language was technically improper but that it was also prejudicial. In the instant case the evidence fails to justify a finding of prejudice or that the trial court abused its discretion in refusing a new trial.

*Appeal from Webster District Court.—HON. C. E.  
ALBROOK, Judge.*

SATURDAY, NOVEMBER 18, 1911.

ACTION for damages for negligent construction of defendant's railroad across plaintiff's land, and for appropriating a part of plaintiff's land outside of the right of way, and for failure to construct crossings. There was a verdict and judgment for the plaintiff. Defendant appeals. *Affirmed.*

*Dyer & Dyer and Healy & Healy*, for appellant.

*Kelleher & O'Connor*, for appellee.

EVANS, J.—I. Appellee has submitted a motion to affirm; also a motion to strike a certain amended abstract filed by appellant. The ground of the motion to affirm is that the shorthand notes of the trial below were never filed with the clerk until more than one year after the trial. On the face of the record as it was when appellee's motion was filed, such motion was good. After the filing of the same, however, the appellant proceeded in the trial court, and by proper proceedings obtained a correction of the record, whereby it is made to appear that the shorthand notes were duly filed during the term in which the trial was had. Such correction of the record, and the proceedings relating thereto, are made to appear by an amended abstract filed by appellant. Appellee has filed a motion to strike such amended abstract, on the ground that it was filed out of time and only a few days before the date assigned for the submission of the case. But such amended abstract of appellant was filed within a few days after the order correcting the record was made in the court below. Manifestly it could not have been filed prior to the entering of such order of correction. The delay might have given the appellee ground to ask for a continuance, but he did not

1. APPEAL:  
amended ab-  
stract: dili-  
gence.

ask it. No lack of diligence on the part of the appellant is made to appear. The motion to strike the amended abstract is therefore overruled. The record as so amended cuts the ground from under appellee's motion to affirm. Such motion is also overruled.

II. The plaintiff is the owner of the south one-half of the north one-half of a certain section 24, and also of the north half of the southeast quarter of such section 24.

The defendant's railroad is laid north and south along the half section line of section 24. Such half section line is the center line of the right of way which comprises fifty feet on each side of such center line. The plaintiff conveyed to defendant the right of way across his land in July, 1906, and the road was constructed thereon immediately thereafter. There are four branches to plaintiff's claim: First. He claims rental value of land outside of the right of way which was inclosed by the defendant. Upon this item the jury allowed him \$1.50. Second. He claims damages for excavations, and for dirt appropriated by the defendant company upon the plaintiff's land and outside of the right of way. On this item the jury allowed \$100, and this was reduced by the court to \$25. Third. He claims damages for the failure of the railroad company to erect such a crossing as was stipulated for in the deed of conveyance. On this item the verdict allowed him \$100. Fourth. He claims that he had a system of tile drainage which was effective to carry the water from his west eighty eastward; that the right of way was laid across his main tile; that in the construction of the road the defendant negligently and unnecessarily dug borrow pits above his main tile drain, and that his tile was thereby exposed to the action of the frost, and thereby injured or destroyed. On this item the jury awarded him \$525, which was reduced by the court to \$480. The principal controversy centers upon the

2. RAILROADS:  
negligent construction:  
drainage: evidence.

last and largest item, and we will give to it our first attention.

The defendant set up an affirmative defense to the effect that the road was constructed by an independent contractor, known as the Northwestern Construction Company, and that if there was any negligence in the construction of the road such negligence was chargeable to the independent contractor alone, and that the defendant never assented to or acquiesced in any such act of negligent construction. A written contract was introduced in evidence, purporting to have been entered into in June, 1906, by the defendant railroad company and the construction company, above named. It was and is the contention of the defendant that such written contract was conclusive proof in support of its defense, and that the trial court should have directed a verdict in its favor on such ground. The contract is too lengthy to be set out in full. The trial court submitted to the jury the question whether the road was in fact constructed by an independent contractor. It is urged that the submission of such a question was in effect permitting the jury to construe a written contract. We are convinced that the defendant has no just ground of complaint at this point, and this is so for divers reasons.

The written contract was not conclusive upon the plaintiff. He was not a party thereto. In so far as such contract became proper evidence on behalf of the defendant, the plaintiff was entitled to meet it by other evidence, parol or otherwise. The contract on its face was incomplete in its provisions. It called for a construction of the road in accord with certain specifications, which were to be *thereafter* presented and attached to the contract. It is not made to appear that any specifications were ever thereafter attached or presented. It is conceded that the road was not in fact constructed by such construction company. The claim at this point is that it sublet the work to a subcontractor under a written contract, which is not in evidence.

The contract introduced shows that the proposed work was to be done under the supervision and to the "satisfaction" of the engineer of the defendant company. The testimony on behalf of the plaintiff tended to show that the engineer of the defendant company was in charge of the construction, and that he directed in person the details of the work. It does not affirmatively appear that he directed the specific location of the borrow pits; neither does it appear that any other person did.

There is the further difficulty for the defendant that the plaintiff claims as for a continuing injury in the continuance of the exposure of his drain tile to the action of the frost. Even if the construction company were exclusively guilty of the initial wrong, the defendant continued the wrong which resulted in final injury to the plaintiff. The defendant's possession of the right of way was primarily exclusive, and it alone could restore the surface of the ground to the condition necessary for the protection of the tile. It is undisputed that the removal of the dirt from above the tile was wholly unnecessary for the purpose of the construction of the road. We are impressed that the rule of exemption from liability for acts of an independent contractor has little, if any, application to such a case as this, and that the instruction of the trial court on that subject was rather more favorable to the defendant than it was entitled to. In any event, the evidence is quite sufficient to show the assent and acquiescence of the company. *Waltemeyer v. Wisconsin Railway*, 71 Iowa, 629. On the other hand, there is no evidence tending to show that the contractor went beyond the specifications or exceeded the authority conferred upon him by the defendant company. *Elliott on Railroads*, vol. 2 (2d Ed.), 868; *Bloomfield v. Grace*, 112 Ind. 128, (13 N. E. 680). It is our conclusion that the trial court did not err in refusing a peremptory instruction upon this question.

III. In this connection, it is urged that the plaintiff

waived all claims for damages by an express provision to that effect, contained in his deed to the defendant, as fol-

3. SAME: negli-  
gent construc-  
tion: waiver  
of damages. lows: "And the said Andrew J. Swanson and Clara L. Swanson, his wife, hereby release all damages to their lands by reason of constructing, operating and maintaining a railroad on said strip of land." The foregoing language can be fairly applied only to such damages as would result to the plaintiff from a proper and reasonable construction and maintenance of the road. It cannot fairly be construed to apply to damages arising out of negligent construction or out of a breach of the conditions upon which the deed was delivered.

4. SAME: evi-  
dence. The alleged fact that plaintiff's tile was destroyed by the action of the frost is not very satisfactorily proven. The evidence at this point is very meager indeed. It is circumstantial only, and consists of the circumstance that the water gathers upon the right of way near the line of the tile, and is very slow in disappearing. No one appears to have actually inspected the tile; nor was there any direct evidence as to the actual condition of the tile. It appears that only twelve or fifteen inches of soil was left above the tile, and that the natural action of frost would tend to destroy it in such condition. The defendant company was in possession of the ground in which the tile is laid. We reach the conclusion that the evidence on behalf of the plaintiff was *prima facie* sufficient to go to the jury.

What we have here said in this division of the opinion is practically determinative of the questions raised concerning the items of the verdict of \$1.50 and \$25 already referred to, and we shall not enter into a further discussion of such items.

IV. The deed whereby plaintiff conveyed a right of way provided for "one crossing similar to a public highway crossing, protected by cattle guards and regular gates to be put in." The defendant company constructed for the plain-

tiff two crossings, but neither of them conforms to the requirements of the deed, in that they are not protected by cattle guards, nor by wing fences. One count of the plaintiff's petition was based upon a breach of this condition. The defendant pleaded affirmatively that the plaintiff had waived this provision of the deed, and in lieu thereof had accepted two private crossings, neither of which was to be protected by cattle guards or wing fences. It is urged that the testimony at this point is conclusive for the defendant. We do not think so. On the contrary, the testimony of plaintiff is direct and positive that, although he asked for two crossings in lieu of one, he never consented to any different kind of crossing than that provided for in the deed. This question was submitted to the jury under proper instructions, which are not complained of. It is urged that there is no evidence of any damage by reason of the failure to erect cattle guards and wing fences. Manifestly, cattle guards and wing fences have their function. A crossing so protected can be used more conveniently and safely for driving stock from one side of the right of way to the other. When a crossing is not protected in this manner, its use is burdened with the necessity of taking precautions against the escape of stock along the right of way. Such was the opinion of witnesses, who testified to the difference of value and of rental value of plaintiff's farm with and without the protection. The verdict as rendered has such support in the evidence that we cannot interfere with it.

V. It is urged that there was such misconduct on the part of the plaintiff's counsel in the closing argument to the jury that the trial court ought to have granted a new trial on that ground. We are confronted with some difficulty as to the sufficiency of the record for the purpose of this exception. In the motion for a new trial, the appellant set forth a somewhat extended statement of the alleged language of

5. SAME: private crossings: waiver of evidence.

6. NEW TRIAL: misconduct in argument: sufficiency of record.

counsel for appellee in his argument to the jury. The incorporation of such alleged language in a recital in a motion is not sufficient to make such language a matter of record, as a basis for exception thereto. *Gray v. C., M. & St. P. R. Co.*, 75 Iowa, 100. This point is practically conceded by appellant's counsel, and they do not ask a consideration of the recital of their motion for a new trial. They contend, however, that during the argument complained of they made a formal objection to such argument, and recited into the record the particular language to which exception was taken, and that such objection and recital were then and there taken down by the shorthand reporter, and thus incorporated as a part of the shorthand report of the trial. That this is a sufficient record to show the ground of the objection, and to show the particular language to which they objected, is clear enough. But whether it can be said to be a finding or certification of the trial judge that the language charged was in fact used in the manner and form as charged is a more difficult question. We pass it by for the moment.

The ground of objection in this case was that appellee's counsel was "calling the attention of the jury to the fact that the defendant is a corporation and not an individual."

The specific language complained of as being directed to that end was: "No person with a beating heart would do that. That is only the work of a business company." This statement had been preceded by the preparatory remark that this tile represented the "work and sweat of a lifetime." The question before us is whether the trial court abused its discretion in refusing a new trial, by reason of this remark of appellee's counsel. The question is one wherein the trial court has a large and important discretion. In order to overrule that discretion, we must find, not only that the remark was technically improper, but that it was prejudicial. The trial court was present

7. SAME: appeal:  
discretion:  
prejudice.

and heard the argument in this case. No ruling was made upon the objection, and none was asked, except so far as an objection made may imply a request for a ruling. The question was necessarily before the trial court upon the motion for a new trial. His ruling was a finding that there was no prejudice in the remark. We are impressed that such finding was well within his discretion. The inflammatory character of the remark is not very prominent. The facts and circumstances appearing in evidence are all quite commonplace, and there is nothing in them calculated to greatly inflame the passion of the jury. There is some ground, also, for saying that the remark was within the range of fair argument on the question of negligence, namely, whether the act complained of was one which a reasonably prudent person would not have done. True the argument is more glowing than the legal proposition, but some degree of heat is a prerogative of argument. We are satisfied that the record before us would not justify a finding of prejudice, or that the trial court went beyond its fair discretion in refusing a new trial. *Wissler v. Atlantic*, 123 Iowa, 11; *Brusseau v. Brick Co.*, 133 Iowa, 245; *Estate of Wharton*, 132 Iowa, 714; *Geiger v. Payne*, 102 Iowa, 581; *George v. Swafford*, 75 Iowa, 491; *Dowdell v. Wilcox*, 64 Iowa, 721; *Scott v. Railway Co.*, 68 Iowa, 360; *Shepherd v. Railway Co.*, 77 Iowa, 54.

VI. Some other errors are assigned and argued which relate to rulings on evidence. The discussions in divisions 2 and 3 hereof are quite decisive of them all, and we will not elaborate upon them in detail.

We find no ground of reversal. The judgment below is therefore *affirmed*.

THOMAS A. CHESHIRE V. DES MOINES CITY RAILWAY  
COMPANY, and INTERURBAN COMPANY, Appellants.

**Attorney's liens:** NOTICE. An attorney is entitled to a lien for a  
1 general balance of compensation upon money due his client in  
the hands of the adverse party, whether his right to compensa-  
tion grows out of a written or oral contract, contingency, *quantum*  
*meruit* or a fixed amount; and notice thereof need not state  
the details of his employment.

**Same:** TO WHAT LIEN ATTACHES. A contract to prosecute an action  
2 for personal injury for a portion of the damages recovered is  
sufficient to authorize a lien upon money paid the client, as a  
compromise and settlement of the claim.

**Same:** SETTLEMENT OF ACTION: COMPENSATION OF ATTORNEY. Where  
3 plaintiff in a personal injury action secretly settled the same  
with the defendant, the attorney's agreement to prosecute the ac-  
tion for a portion of the sum recovered was waived and he  
thereby became entitled to the agreed compensation as against  
the plaintiff and also defendants, when served with notice of  
the lien.

*Appeal from Polk District Court.*—HON. HUGH BRENNAN,  
Judge.

SATURDAY, NOVEMBER 18, 1911.

ACTION to recover lien for attorney's fee resulted in  
judgment as prayed. The defendants appeal. *Affirmed.*

*Guernsey, Parker & Miller*, for appellants.

*Thos. A. Cheshire*, for appellee.

LADD, J.—The plaintiff, an attorney at law, was em-  
ployed by Edith Lowe, October 2, 1909, to bring and prose-

cute a suit against the Des Moines City Railway Company and the Interurban Railway Company, to recover damages sustained by the first party in a collision on the street railway company bridge over the Des Moines river, in which collision the first party received personal injuries.

The party of the first part hereby agrees to pay to the party of the second part a sum equal to an undivided one-half ( $\frac{1}{2}$ ) of whatever may be received of said railway companies, or either of them, as damages on account of said injuries. The party of the second part hereby agrees to bring and prosecute a suit with reasonable diligence against said railway companies, in the name of the party of the first part, for said damages, as first party's attorney. It is mutually understood and agreed, by and between the parties hereto, that, should nothing be recovered by way of suit or settlement, then the party of the second part is to receive nothing for his services as attorney for party of the first part.

Suit was begun in pursuance of this contract by plaintiff causing original notice to be served on defendants October 7, 1909, claiming damages for his client in the sum of \$10,000, and at the same time notifying them that he claimed "an attorney's lien in the sum of \$5,000 on any money in your hands due the above-named plaintiff, Edith Lowe, on account of personal injuries sustained by her for which the above-entitled cause is brought; same being for professional services rendered and to be rendered the plaintiff in said cause." On the 22d of October, plaintiff prepared and filed the petition in the cause, but two days prior thereto his client, without his knowledge, had settled with defendants for \$400, and signed a dismissal of the cause, which was filed November 10th following. The agreement signed by her recited the consideration received was "by way of compromise and settlement of the claims hereinafter referred to," that she released the company from "all claims and demands against it, and especially from all liability to her" for loss or damages by reason of the accident

(describing it), and from "all claims set up" by her in the suit, and acknowledged "receipt of the payment of the above amount, paid as aforesaid by way of settlement and compromise of said claim." On this state of facts, the plaintiff demanded and was awarded judgment against defendants for a sum equal to one-half that paid his client.

The defendants contend: That, (1) as the notice of attorney's lien served did not advise them of any written contract of employment, they had a right to assume that reasonable compensation would be claimed; (2) that, as plaintiff was to be paid a share of the damages only, and what Edith Lowe received was in compromise of litigation, he was not entitled to recover; and, (3) as plaintiff undertook to "bring and prosecute" the suit, and in fact only brought it, he had not earned the contract price, and was entitled to reasonable compensation only.

I. It was not incumbent on the attorney in serving defendants with notice of his claim of the attorney's lien to state therein the details of his contract of employment.

1. ATTORNEY'S LIENS: notice. The lien is for "the balance of compensation," whether owing by virtue of a written or oral agreement, or to be measured contingently, or on *quantum meruit*, or for a fixed amount, and all exacted is that the notice contain a general statement of the amount claimed and the services for which rendered. This appears from section 321 of the Code, which provides that: "An attorney has a lien for a general balance of compensation upon: . . . (3) Money due his client in the hands of the adverse party, or attorney of such party, in an action or proceeding in which the attorney claiming the lien was employed, from the time of giving notice in writing to such adverse party, or attorney of such party, if the money is in the possession or under the control of such attorney, which notice shall state the amount claimed, and, in general terms, for what services." The notice was sufficient, in that it complied with this statute. The purpose of this

statute is to protect attorneys in the matter of compensation, where, for some reason thought sufficient, their clients settle with the opposite party, unbeknown to them, and the latter, when pursuing this course, must take the risk as to the attorney's claim, and may not assume that no more has been promised than what subsequently shall be adjudged reasonable. The notice was sufficient.

II. It is said that, as nothing was received by Edith Lowe "as damages," the attorney was entitled to no compensation under the terms of his contract. The \$400 was

2. SAME: to what lien attaches. paid to her in compromise of the demands made in the action commenced by serving the original notice and in settlement of this liability for loss or damages by reason of the action complained of. The compromise of a suit neither admits the validity of the claim urged, nor ascertains any amount as being due, and amounts to no more than saying that so much is paid to be rid of the controversy. *Colburn v. Town of Groton*, 66 N. H. 151, (28 Atl. 95, 22 L. R. A. 763.) The claim must have been in dispute. *Greenlee v. Mosnat*, 116 Iowa, 535, and the compromise necessarily involves a demand or concession to some extent of the claim asserted, *Rankin v. Schofield*, 70 Ark. 83 (66 S. W. 197), and operates as a merger of and bars the right to recover for the damages in the suit. Though the payment was strictly in compromise of the action, it was because of the injury alleged to have been suffered by Edith Lowe and the damages claimed by her, and we are of the opinion that it should be construed to be "as damages," within the meaning of her contract with plaintiff, especially as this is fairly to be implied from the condition therein that he should be paid no compensation, if nothing were received in the settlement; it being fairly to be implied therefrom that he should be paid, if anything were so received.

III. The attorney undertook to "bring and prosecute suit," and to do so with reasonable diligence, against de-

fendants, and they argue that, as he merely brought and did not prosecute the action, he did not earn the entire compensation stipulated. Ordinarily, to prosecute an action includes the commencement thereof, and is not confined to the pursuit of the remedy thereafter, *Inhabitants of Clinton v. Heagney*, 175 Mass. 134, (55 N. E. 894), but may refer to proceedings after the suit has been begun. *Buecker v. Carr*, 60 N. J. Eq. 300, (47 Atl. 34.) It is quite immaterial to determine the sense in which the expression was employed in this contract, however, for if plaintiff failed to prosecute the action, it was owing to the secret settlement of his client with defendants. She thereby waived full compliance therewith, *Larned v. City of Dubuque*, 86 Iowa, 166, 181, and, as this defense could not have been interposed by the client, is not available to defendants.—*Affirmed*.

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WILLIAM B. WOOD, Appellant, v. BOONE COUNTY and J. W. KEIGLEY, Appellees.

**Poor persons:** SUPPORT OF TRANSIENT POOR: LIABILITY OF OFFICERS.

- 1 The liability of a county or its officials for relief of the poor is purely statutory; and as there is no statute creating a liability on the part of the county for failure to furnish proper relief to a transient poor person, a supervisor and overseer of the poor is not personally liable for such failure.

**Same:** GOVERNMENTAL DUTIES: LIABILITY. The furnishing of aid to the poor is a governmental function, and generally neither the state nor its instrumentalities are liable for the performance of such duty.

*Appeal from Story District Court.*—HON. C. G. LEE,  
Judge.

MONDAY, NOVEMBER 20, 1911.

ACTION at law to recover damages due to defendants' failure to furnish plaintiff, who was a transient poor person, proper relief. Defendant Keigley was a member of the board of supervisors of defendant county and overseer of the poor of that county. At the close of plaintiff's testimony, the trial court directed a verdict for the defendants, and plaintiff appeals. *Affirmed.*

*Fitchpatrick & McCall* and *Robert M. Witmer*, for appellant.

*Harpel & Cederquist* and *E. H. Addison*, for appellees.

DEEMER, J.—There being no legal obligation at common law upon a county or any of the instrumentalities of government to furnish relief to the poor, plaintiff's action, if he has any, must be bottomed upon some statute entitling him to relief. *Cooledge v. Mahaska County*, 24 Iowa, 211. His counsel think they find such duty in sections 2225 and 2230 of the Code, reading as follows:

1. POOR PERSONS:  
support of  
transient poor:  
liability of  
officers.

A person coming from another state, and not having become a citizen of nor having a settlement in the state, applying for relief, may be sent to the state whence he came, at the expense of the county, under an order of the district court or judge; otherwise he is to be temporarily relieved in the county where he applies. Code, section 2225.

The township trustees of each township, subject to general rules that may be adopted by the board of supervisors, shall provide for the relief of such poor persons in their respective townships as should not, in their judgment, be sent to the county home. But where a city is embraced, in whole or in part, within the limits of any township, the board of supervisors may appoint an overseer of the poor, who shall have within said city, or part thereof, all the powers and duties conferred by this chapter on the township trustees. The relief may be either in the form

clothing, fuel and lights, medical attendance, and shall not exceed two dollars per week for whom relief is thus furnished, exclusive of attendance. They may require any able-bodied labor faithfully on the streets or highways at the rate of five cents per hour in payment for and as a condition of granting relief; said labor shall be performed in the direction of the officers having charge of working streets and highways. When medical services are rendered by order of the trustees or overseers of the poor, no more shall be charged or paid therefor than is usually charged for like services in the neighborhood where such services are rendered. No supervisors, trustee or overseer shall be directly or indirectly interested in any supplies furnished the poor. Code, section 2230.

The poor must make application for relief to the trustees of the township where they may be, and if the trustees are satisfied that the applicant is in such a state of want as requires relief at the public expense, they may afford such relief, subject to the approval of the board of supervisors, as the necessities of the person require, and shall report the case forthwith to the board of supervisors, who may continue or deny relief, as they find cause. The board of supervisors may examine into all claims, including claims for medical attendance, allowed by the township trustees for the support of the poor, and, if they find the amount allowed by said trustees to be unreasonable, exorbitant or for any goods or services other than for the necessaries of life, they may reject or diminish the claim as in their judgment would be right and just and this act shall apply to all counties in the state, whether there are county homes established in the same or not. This act shall apply to acts of overseers of poor in cities as well as to township trustees. Code, section 2234.

In addition to these sections, we quote the following as having some bearing upon the case:

Persons coming into the state, or going from one county to another, who are county charges or are likely to become such, may be prevented from acquiring a settlement by the authorities of the county, township or city in which such persons are found warning them to depart therefrom.

After such warning, such persons cannot acquire a settlement except by the requisite residence of one year without further warning. Code, section 2226.

Such warning shall be in writing, and may be served upon the order of the trustees of the township, or of the board of supervisors, by any person; and such person shall make a return of his doings thereon to the board of supervisors, which, if not made by a sworn officer, must be verified by affidavit. Code, section 2227.

The trustees in each township, in counties where there is no county home, have the oversight and care of all poor persons in their township, and shall see that they receive proper care until provided for by the board of supervisors. Code, section 2233.

All claims and bills for the care and support of the poor shall be certified to be correct by the proper trustees and presented to the board of supervisors, and, if they are satisfied that they are reasonable and proper, they shall be paid out of the county treasury. In no case shall a trustee, or either of the trustees, nor overseer of the poor, draw an order upon himself, or upon either of the board for supplies for the poor, except such trustees or overseer has a contract to furnish said supplies. Code, section 2235.

The board of supervisors may make contracts with the lowest responsible bidder for furnishing any or all supplies, medical attendance or services required for the poor, for a term not exceeding one year, or it may enter into a contract with the lowest responsible bidder, through proposals opened and examined at a regular session of the board, for the support of any or all the poor of the county for one year at a time, and may make any requisite orders to that effect, and shall require all such contractors to give bonds in such sums as it believes sufficient to secure the faithful performance of the same. Code, section 2238.

The word 'poor' and 'poor person' as used in this chapter shall be construed to mean those who have no property, exempt or otherwise, and are unable, because of physical or mental disabilities, to earn a living by labor; but this section shall not be construed to forbid aid to needy persons who have some means, when the board shall be of opinion that the same will be conducive to their welfare and the best interests of the public. Code, section 2252.

Now the charge in the petition is, in substance, that plaintiff was a foreign pauper; that he came into defendant county about January 25, 1908, with badly frozen feet which needed medical attention; that defendant Keigley was a member of the board of supervisors of defendant county, and a committee on and the overseer of the poor; that plaintiff made application to the defendant through its proper officers for relief, and that defendant undertook to furnish him some relief, but that, after undertaking the same, it negligently, wrongfully, and unlawfully withheld adequate or proper treatment, and on the 27th day of January "expelled plaintiff from Boone county," subjecting him to exposure, and depriving him of proper care until he reached Cerro Gordo county on the 29th day of January, where he was received and taken care of by the proper county authorities. He claims that by reason of the negligent and wrongful conduct of the defendant county, and its agent, Keigley, he lost both feet, and suffered great mental and bodily pain. The testimony shows that plaintiff arrived in the city of Boone at the time alleged; that his feet were frozen; that he went to the police station in Boone, and asked the chief of police where he could find a doctor. To this the chief responded that he would see. The mayor of the city was also present, and, after some cross-examination of plaintiff by these officials, plaintiff said to them that he was short of money, and needed a doctor. The police officer told plaintiff he would give him a night's lodging, and accordingly housed him in the police station during the night. When plaintiff arose in the morning, he made inquiry as to the doctor, and the chief of police said he would see about it. About 11 a. m. plaintiff was taken to the office of the county physician, and there examined and given some treatment. The doctor then said to him that he would have to get him into a hospital. After plaintiff's return to the police station after seeing the

doctor, he first met defendant Keigley, and he testified to the following conversation with him, Keigley:

He told me that the doctor said for me to keep my feet warm. He placed a chair for me to put my feet on near the radiator, and I made the remark to Keigley that the doctor said he would get me in the hospital. Mr. Keigley said, "Did he say that?" and turned and went out of the station. The doctor saw plaintiff on Sunday morning, and on Monday morning he again visited plaintiff, at his, plaintiff's request, in company with defendant Keigley and the chief of police. The doctor dressed plaintiff's feet in the presence of the others, and remarked that they were looking good. At this time the doctor asked plaintiff where he lived, and was informed that he used to live in Wisconsin. He was then asked if he wanted to go there, and, in response, said that, if he had the means to go, he would like to. The doctor then said he would talk with defendant Keigley about it. On Monday afternoon the chief of police came to plaintiff, and said, "We are going to send you away on the 5:30 train." Making no protest, he started to walk to the depot, but was finally taken in a buggy by the chief to the railway depot, and given a ticket to Nevada, Story county, just as the train was about to start. When he arrived at Nevada, the following occurred: "The train reached Nevada about 6 o'clock, where I got off. A busman took me up to a restaurant. I got some supper there. After supper I walked on the street thinking to see the marshal, and, not seeing him, I went to a livery barn. My feet were very painful at this time, and I was more unwell than I was in the afternoon. At the livery barn the proprietor permitted me to sleep in the office. The next morning I saw Mr. Corbin, the marshal. . . . The livery man found him for me. Mr. Corbin said for me to stop there, and he would go and build a fire at the city hall, and that I could then go there and lie down. About half an hour after that I walked over to the city hall. At the city hall that morning, Tuesday, about 9 o'clock, Dr. Chamberlain came to see me. My feet were very painful, and I was getting quite sick. The doctor dressed my feet. They were quite dark at that time. After that visit I did not walk any more. My feet had

got so painful that I could not. I was there until the evening train went east. Mr. Corbin bought me a ticket to Mason City, and gave me money to go from there to Wisconsin, and there was a cot and comforter brought in to me. The train left soon after 6 o'clock . . . the same number I came on from Boone.

He pursued his journey through Marshalltown, and was taken off the train at Mason City, and there given attention by the public authorities.

That plaintiff lost his feet by reason of inadequate and untimely treatment a jury may well have found, but the vital and fundamental question in the case is the liability of the defendant county and the member of the board of supervisors, who is made a codefendant. In addition to what has already been set out, the following is the only testimony of plaintiff with reference to defendant Keigley's connection with the matter:

I told Dr. Nimms I used to live in Wisconsin, that I had a brother there that I used to make my home with, but he was not living there. Q. Mr. Keigley was there? A. Mr. Keigley and Mr. Jones. Whether they were in there at the time we had this conversation I don't know. Q. Didn't you tell Dr. Nimms that you wanted to go to your relation in Wisconsin? A. He asked me if I wanted to go, and I said: 'If I had the means to go, I would go.' I didn't tell him I wanted to go. My first talk with Mr. Keigley was shortly after seeing the doctor the first time. I was sitting on a chair near the window by the radiator, and he said, 'The doctor says you must keep your feet warm,' and he got a chair and placed it there for my feet. Q. He spoke to you kindly? A. Yes, that was when I made the remark to him that the doctor told me he would get me into a hospital, and he remarked, 'Did he say that?' and went out. Q. What did you say? A. I said, 'Yes, sir,' and he went out. Mr. Keigley was in when the doctor was looking at my feet the next day. I don't call to mind that he made any remark in particular. That is the last time I saw Mr. Keigley.

However, the chief of police said that he purchased the ticket for plaintiff upon the advice of Keigley, and that he was reimbursed for the cost thereof by Keigley, and Keigley presented his bill to the board, and it was allowed. It should also be stated in this connection that there was testimony tending to show that with proper treatment at Boone plaintiff's feet might have been saved. Such is the record in its most favorable aspect for plaintiff, and we have to inquire whether or not there is any legal liability on the part of the defendants or either of them. It is argued that defendant Keigley may be liable, although the defendant county may not be, for the reason that he was under a personal duty of using due care—a care commensurate with the situation in which he found the plaintiff. Whatever the view of other courts upon this proposition, we are committed to the doctrine that, under the facts here disclosed, there is no liability on the part of Keigley, unless the county be held responsible. From *Packard v. Voltz*, 94 Iowa, 277, we quote as follows, directly applicable to the facts disclosed by this record: "It must certainly be an anomalous doctrine that would exempt the corporation itself from liability for the doing of a lawful act in a negligent manner, upon the ground of its compulsory agency in behalf of the public welfare, and at the same time affix liability upon its agent for precisely the same acts done under express authority. We think an instance of such liability is not to be found. It must be a reason for the rule of exemption on the part of a political corporation that its agency is a public necessity, and it seems to us that the same law that would give it exemption from liability would protect from liability the servant through whom only the corporation can discharge its duty to the public." See, also, *Beeks v. Dickinson County*, 131 Iowa, 245.

So that we are brought at last to the controlling proposition: Is a county liable in damages for failure to fur-

nish adequate and timely medical aid and assistance to a foreign pauper who may transiently be within its borders? A county is an instrumentality of government, and the furnishing of aid to the poor is a governmental function. The necessity for and the extent of such relief is largely, if not wholly, a matter of discretion, and is *quasi* judicial in character. The relief which may be granted a foreign pauper is temporary in character, and such persons may be prevented from acquiring a settlement in the county where found. Before one is entitled to relief under section 2234 of the Code he must satisfy the overseer of the poor within a city that he is in such a state of want as requires relief at public expense, and even then this section does not require that such relief be furnished. Moreover, not only the overseer of the poor must be so satisfied, but the board of supervisors are also to look into the matter, and inquire as to the necessities of the case.

It is a general rule that where a governmental duty rests upon a state or any of its instrumentalities, there is absolute immunity in respect to all acts or agencies. *Beeks v. Dickinson County, supra*. In this case it is said:

In so far as a municipality undertakes the duty of making and enforcing quarantine regulations and other laws for the promotion of the public health, it is performing governmental functions, and its officers are not agents for whose actions or inaction it is liable, unless such liability is imposed by its charter or by the laws of the state under which it exists. . . . The remaining question is whether the members of the local board of health are individually liable for the loss of the plaintiff's crops. The statute makes it the duty of the health officers to quarantine against all 'infectious or contagious diseases dangerous to the public,' and it can not well be questioned that the defendants were acting within their scope of duty as such officers, and that in establishing the quarantine they were acting in a *quasi* judicial character. They were vested with the power to determine whether an infectious or contagious disease ex-

2. SAME: gov-  
ernmental du-  
ties: liability.

isted in the appellant's family, and, if found to exist, their duty under the statute required them to take proper steps to prevent its spread, and, had they neglected to do so, they would have been culpable in a high degree. They were therefore acting judicially, and it is the general rule that officers so acting are not liable for injuries which may result from such acts performed in the honest exercise of their judgment, however erroneous or mistaken the action may be, provided there be no malice or wrong motive present.

See, also, *McFadden v. Town of Jewell*, 119 Iowa, 324. As supporting the same proposition, see *Ogg v. Lansing*, 35 Iowa, 495; *Kincaid v. Hardin Co.*, 53 Iowa, 431; *Calwell v. Boone*, 51 Iowa, 687; *Saunders v. Ft. Madison*, 111 Iowa, 103; *Lahner v. Williams*, 112 Iowa, 428; *Easterly v. Irwin*, 99 Iowa, 696. A great number of cases announcing the same rule are to be found in 28 Cyc. pages 1305, 1306. Some cases seem to make an exception where the county undertakes to furnish relief, and in doing so negligently fails to use proper and necessary care. Such an exception seems to be made in *Meier v. Paulus*, 70 Wis. 165 (35 N. W. 301). But the contrary rule was announced in *Lexington v. Batson*, 118 Ky. 489 (81 S. W. 264); *Twyman v. Frankfort*, 117 Ky. 518 (78 S. W. 446, 64 L. R. A. 572); *Richmond v. Long*, 17 Grat. (Va.) 375 (94 Am. Dec. 461).

That the Wisconsin court did not intend to depart from the general rule is manifest from a consideration of a later case reported in 92 Wis. 263 (65 N. W. 1030), under the title of *Kuehn v. City of Milwaukee*. Again, in the *Meier* case, the action was against a county poor master for his personal neglect, and it is clearly stated in the opinion that defendant was under no obligation to receive an insane patient, and could not have been held liable for failure to accept him as an inmate of a county house, but that, having received him, he was under the duty of exercising ordinary care for his safety. The question of liability for failure to exercise a governmental

function was neither discussed nor decided. Conceding *arguendo* that the defendant Keigley might be personally liable for failure to exercise due care after undertaking to grant a relief, although the county itself would not be liable, this liability must be founded upon negligence, and it must be shown that he undertook to furnish plaintiff with proper treatment in virtue of his office, and that he either wrongfully or negligently failed to perform the duty. There is no showing that defendant did anything more than see the plaintiff when the county physician was treating him, and that he had no other part in securing his removal from the county than ratifying what the chief of police did by reimbursing him the amount paid for the ticket. It is very doubtful if this amounted to anything more than an attempt upon the part of defendant to get plaintiff out of the county, to which the plaintiff consented. But the greatest obstacle to recovery is the fact that there is no testimony tending to show that defendant Keigley knew it was dangerous to life or health to send the plaintiff away. The doctor who had charge of plaintiff for defendant county said in the presence of both plaintiff and Keigley that his, plaintiff's, feet were looking good. After that plaintiff started to walk to the train and was picked up by the chief of police and carried there in a buggy. There is a lack of testimony showing, or tending to show, that defendant Keigley had any knowledge or information of any danger involved in moving the defendant away from the county. The most that can be said is that defendant wanted to rid the county of the expense of caring for plaintiff, and that he was seeking to avoid furnishing aid. Had it been shown, as in the Wisconsin case, that defendant Keigley knew of the plaintiff's condition, and that he was likely to suffer great injury if he were not cared for, there might, if we were to adopt the reasoning of the minority of the courts, be some ground of liability. But the record does not disclose such a situation. However,

we are committed to the doctrine of absolute immunity in the performance of this governmental function to both the county and its officials, and, if we are to adhere to this rule so many times announced, the other proposition need not be considered.

We can not close, however, without suggesting that the practice of shifting foreign paupers from one county to another does not meet with our approval, and such a policy as said in *Mansfield v. Sac County*, 60 Iowa, 14, is a disgrace to our civilization.

Our conclusion is that the judgment must be, and it is, *affirmed*.

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JELSKE CRAMER, Appellee, v. CHICAGO, ROCK ISLAND & PACIFIC RAILROAD COMPANY, Appellant.

**Carriers: LIMITATION OF LIABILITY BY CONTRACT: FEDERAL STATUTES:**

- 1 **POWER OF STATE.** The statute of this state which declares invalid any contract with a railway company whereby an attempt, by means of an agreed valuation of property shipped, is made to limit the liability of the company for negligent transportation, is not superseded by the Acts of Congress relating to interstate commerce; as the statute was in force and had been held valid prior to the action of Congress; and the state is not deprived thereby of its right to enact such a statute by virtue of its police power.

**Same: FILING OF RATES WITH INTERSTATE COMMERCE COMMISSION: EF-**

- 2 **EFFECT.** The filing with the Interstate Commerce Commission of a schedule of rates raises no presumption that the commission agreed to such rates, or to the proposed conditions of shipment, and thus gave its sanction to the class of contracts prohibited by our statute, so that it may be said the power of the state has been superseded by Federal action; especially in view of the Federal statute providing that an initial carrier shall be liable for the negligence of any connecting carrier, notwithstanding any contract or regulation to the contrary.

**Same: INTERSTATE SHIPMENTS: CONTRACT: LIABILITY: INVALIDITY:**

- 3 **EFFECT.** The determination that a contract for an interstate shipment of property, providing that in case of loss the shipper can

only recover the agreed value, is invalid, does not operate to give the shipper a rebate, even though a lower rate was charged because of low valuation, but simply affords him an opportunity to recover his actual loss.

- Same.** Filing a schedule of transportation rates with the Interstate  
 4 Commerce Commission, at a time when the Commission had no power to fix rates, in which one rate was made to shippers in consideration for a stipulated recovery value in case of loss, and another rate where no such stipulation was made, does not determine the validity of the contract but leaves the question to the state courts; and a determination by a state court that the contract is invalid does not result in giving to a shipper by that method a less rate than that required by law.

*Appeal from Wright District Court.*—HON. CHAS. E. ALBROOK, Judge.

MONDAY, NOVEMBER 20, 1911.

ACTION at law to recover for damages done to a shipment of hogs over defendant's road from Galt, Iowa, to Chicago, Ill. Many defenses were interposed, to some of which plaintiff demurred. This demurrer was sustained in part and overruled in part, and the case was tried, resulting in a judgment for plaintiff in the sum of \$828. Defendant appeals.—*Affirmed.*

*Carroll Wright, J. L. Parrish and Ladd & Rogers, for appellant.*

*Nagle & Nagle, for appellee.*

DEEMER, J.—The appeal presents but a single question. Defendant pleaded as a partial defense certain stipulations in the bill of lading issued to plaintiff for the car of hogs, reading as follows:

Eighth. That in case of total loss of any of the live stock covered by this contract from any cause for which

the first party may be liable, payment will be made therefor on the basis of the actual cash value at the time and place of shipment, but in no case to exceed \$100.00 for each horse, pony, gelding, mare or stallion, mule or jack; \$50.00 for each ox, bull or steer; \$30.00 for each cow; \$10.00 for each calf or hog; \$3.00 for each sheep or goat, and in case of injury or partial loss, the amount of damage claimed shall not exceed the same proportion.

Fourteenth. That no person, other than the owner of the stock shipped, or his duly authorized agent, in the name of the owner, shall be allowed to sign this contract.

Seventeenth. That in making this contract the undersigned owner, or other agent of the owner, of the stock named herein expressly acknowledges that he has had the option of making this shipment under the tariff rates either at carrier's risk or upon a limited liability and that he has selected the rate and liability named herein, and expressly accepts and agrees to all the stipulations and conditions herein named.

Nineteenth. That the evidence that the said second party, after fully understanding and accepting all the terms, covenants and conditions of this contract, including the provisions on the back hereof, and that they all constitute a part hereof, fully assents to each and all of the same, is his signature hereto.

These stipulations were expressly made part of the consideration for the rate, and the contract provided that: 'Said rate being less than the rate charged for shipments transported at carrier's risk, for which reduced rate and other considerations it is mutually agreed between the parties hereto, as follows.'

Based upon these stipulations and agreements, defendant pleaded the following defenses:

That at the time the plaintiff shipped the hogs in question, the defendant had on file with the Interstate Commerce Commission, and on file at Galt, Iowa, its tariff rates on hogs, as required by law. That in said tariff rates, so filed and in force at the time this shipment was made, there were specified therein two rates over defendant's line of railway from Galt, Iowa, to Chicago, Ill.; one where the value of the hogs did not exceed \$10 per head, and the

other rate, which was higher, where the value of the hogs exceeded \$10 per head. It was expressly provided in said tariff rates, so filed and in force at the time the shipment was made, that where hogs were shipped under the lower rate, in case of total loss of any of such hogs, the defendant's liability should not exceed \$10 per head. That said tariff rates were open to the inspection of the public, and plaintiff selected the lower rate, and entered into a written contract with said defendant, which provided that in case of total loss of any of said hogs for which the defendant might be liable, payment therefor was to be made on the basis of the actual value at the time and place of shipment, but in no case should the defendant's liability exceed \$10 per head. Said contract further provided that in making said contract the undersigned owner of the stock named herein expressly acknowledged that he had the option in making said contract under the tariff rates, either at the carrier's risk or upon a limited liability, and that he had selected the rate and liability named herein, and expressly accepts and agrees to all the stipulations and conditions herein named. A copy of said contract is hereto attached, marked 'Exhibit A,' and made a part of this answer.

That said tariff rates under which this shipment was made were binding upon both the defendant and the plaintiff, and neither were at liberty to disregard said tariff rates, without violating the law and being subject to prosecution by the United States government. This court has no authority or jurisdiction to change said tariff rates, by changing the amount of liability that the defendant assumed under said tariff rates at the time the hogs in question were shipped. That the recovery of plaintiff, if he is entitled to recover, is limited to \$10 per head for each hog.

Count 3. The defendant further answering states that it kept on file with the Interstate Commerce Commission, and on file at Galt, Iowa, from where these hogs were shipped, its tariff rates, as required by law. That said tariff rates, duly published as required by law, gave the plaintiff a choice of two rates; one rate where the value of the hogs was \$10 or less, and a higher rate, where the value of the hogs exceeded \$10. The defendant states that the plaintiff, in order to secure the transportation of hogs

in question at less than the published tariff rates, wrongfully represented that the value of the hogs in question did not exceed \$10 per head, and that plaintiff signed the contract marked 'Exhibit A,' a copy of which is hereto attached, and represented therein that the value of the hogs therein did not exceed \$10 per head, when, as a matter of fact, the value of said hogs at the time was much in excess of \$10 per head, which fact was known to the plaintiff at the time said valuation was given, and was not known to the defendant. That no officer or agent of the defendant at that time had seen the hogs, and had no knowledge as to the value of said hogs in question, except that obtained from the contract herein.

That the hogs in question were transported at the lower rate, based on a valuation, not exceeding \$10 per head. That plaintiff is not entitled to recover more than \$10 for each hog, and he is estopped from claiming that the value of the hogs in question at the time of shipment was more than \$10 per head.

That the defendant further states that under the terms of the contract under which the shipment was made the recovery of the plaintiff is limited to the sum of \$10 for each animal, and states that plaintiff can not, in any event, recover more than said amount.

The demurrer to these divisions of the answer was sustained, and the appeal challenges the ruling. Our Code, section 2074, provides that: "No contract, receipt, rule or regulation shall exempt any railway cor-

1. CARRIERS: limitation of liability by contract: federal statutes: power of state.

poration engaged in transporting persons or property from the liability of a common carrier, or carrier of passengers, which would exist had no contract, receipt, rule or regu-

lation been made or entered into." This section has heretofore been held applicable to such provisions as are relied upon by appellant, and the Supreme Court of the United States has held that the state, in virtue of its reserved or police power, had authority to enact such a rule, even though the shipment be interstate in character. See *Solan v. Railroad*, 95 Iowa, 260; *Lucas v. Railroad*, 112 Iowa,

594; *Winn v. Am. Ex. Co.*, 149 Iowa, 259. Also *Chicago, M. & St. Paul R. R. v. Solan*, 169 U. S. 133 (18 Sup. Ct. 289, 42 L. Ed. 688), and *Penn. R. R. v. Hughs*, 191 U. S. 477 (24 Sup. Ct. 132, 48 L. Ed. 268).

It is now argued with apparent confidence that the interstate commerce act (Act Feb. 4, 1887, chapter 104, 24 Stat. 379 (U. S. Comp. St. 1901, page 3154), with its amendments prior to the one of June 18, 1910, has so changed the situation that we should now hold the section of the Code inapplicable to interstate shipments, and, say, once for all, that, as our construction of it affects the published rates approved by the Interstate Commerce Commission, we should now abandon the rule announced in the *Solan* and other like cases. The fundamental proposition relied upon for this conclusion is that, as Congress has now acted upon the subject, the several states have no further control of the matter, and that the rates approved by the Interstate Commerce Commission must control. The difficulty with this proposition is counsel's inability to point to any act of Congress which undertakes to validate any such provision and stipulations as are relied upon by appellant. Such contracts as these have been held invalid by this court because exempting a carrier from an implied liability growing out of its undertaking to carry the property; and in previous cases it has been said that such exemptions are contrary to public policy, and void at common law. See cases heretofore cited. Upon this proposition there is conflict in the authorities, however, and the Supreme Court of the United States has adopted a contrary rule. See *Hart v. Railroad*, 112 U. S. 331 (5 Sup. Ct. 151, 28 L. Ed. 717). But practically all of the courts, including the Supreme Court of the United States, have held such a statute as is found in our Code as section 2074 within the reserved or police powers of the state, and not such a regulation of interstate commerce as to be inhibited by the Federal Constitution. See cases hitherto

cited. We have no doubt of the power of Congress to legislate upon this matter of limiting liability, or to give full recognition and validity to such contracts; but counsel for appellant have failed to point out any act of Congress which does so. Our own reading of the interstate commerce act fails to disclose any such provisions. It is not enough, as we think, that Congress has acted in the matter of interstate shipments, and assumed control thereof. That had been done when the *Solan* and the *Hughs* cases, *supra*, were announced. Definite action in recognition of such contracts as are here relied upon was necessary. No such express legislation is found, and appellant is driven to the necessity of finding recognition of such contracts by implication. The defendant seeks to limit its liability to the sum fixed in the contract because of the shipper's agreement, and it is contended that the Interstate Commerce Commission authorized the making of such contract in approving the rates filed by the company with the commission. It is alleged in the answer that the defendant had two rates for the shipment of stock, each fixed upon the valuation of the property; the low one being given to plaintiff because of the stipulations fixing the amount of liability, and the other a higher one, charged where there was no such limitation or valuation placed upon the property shipped. Concession must here be made that under the decisions of many courts such a contract is valid and binding, and fixes the amount of the shipper's recovery. See cases cited in volume 4, Elliott on Railroads, section 1510. As our rule differs from that announced by many of the courts, and as the construction and effect to be given our statutes is not one of general law, but for the courts of each jurisdiction, we must hold the provisions relied upon invalid, unless it be found that Congress has expressly or by necessary implication approved such stipulations in contracts relating to interstate shipments. *Davis*

*v. Railroad*, 93 Wis. 470 (67 N. W. 16, 1132, 33 L. R. A. 654, 57 Am. St. Rep. 935).

There is no express act of Congress upon the subject; but it is claimed that the Interstate Commerce Commission, acting for the government, has, in virtue of its authority

over the subject, approved such contracts, and that state legislation upon the subject has thereby been abrogated. This, to our minds, is the pivotal point in the case.

2. SAME: filing of rates with interstate commerce commission: effect.

Counsel contend that to give force to our statute is to change a rate of freight authorized by the Interstate Commerce Commission. If that were all of the case, we should be inclined to agree with this contention. But it is provided in an amendment to section 20 of the interstate commerce act, found in U. S. Comp. St. Supp. 1909, page 1166:

That any common carrier, railroad or transportation company, receiving property for transportation, from a point in one state, to a point in another shall issue a receipt or bill of lading therefor and shall be liable to the lawful holder thereof, for any loss, damage or injury to such property caused by it, or by any common carrier, railroad or transportation company to which such property may be delivered, or over whose line or lines such property may pass, and no contract, receipt, rule or regulation shall exempt such common carrier, railroad or transportation company to which such property may be delivered, or over whose line or lines such property may pass, and no contract, receipt, rule or regulation shall exempt such common carrier, railroad or transportation company from the liability hereby imposed: Provided: That nothing in this section shall deprive any holder of such receipt or bill of lading, of any remedy or right of action, which he has under existing laws. That a common carrier, railroad or transportation company issuing such receipt or bill of lading shall be entitled to recover from the common carrier, railroad or transportation company on whose lines the loss, damage or injury shall have been sustained, the amount of such loss, damage or injury, as it may be required to

pay to the owners of such property, as may be evidenced by any receipt, judgment or transcript thereof.

Again, section 9 of the interstate commerce act provides:

That any person or persons claiming to be damaged by any common carrier subject to the provisions of this act may either make complaint to the Commission as hereinafter provided for, or may bring suit in his or their own behalf for the recovery of the damages for which such carrier may be liable under the provisions of this act, in any District Court of the United States of competent jurisdiction; but such person or persons shall not have the right to pursue both of said remedies, and must in each case elect which one of the two methods herein provided for he or they will adopt.

It seems to us that the amendment just quoted makes the initial carrier liable for all damages sustained, and that this liability can not be affected by any contract, rule, or obligation. We concede, however, that these amendments are not controlling upon the proposition here involved, and we cite them to show that, in so far as Congress had acted, prior to June 18, 1910, there was no attempt to vitalize such contracts as are here involved. We do not understand that the Interstate Commerce Commission approves and adopts all rates and conditions contained in any schedule of rates filed by a common carrier. At the time when the shipment in question was made the Interstate Commerce Commission had no authority to fix rates for future shipments. It did have power, however, to determine upon the reasonableness of rates, when that question was brought before it. *Interstate Com. v. Ala. R. R.*, 168 U. S. 144 (18 Sup. Ct. 45, 42 L. Ed. 414); *I. S. C. C. v. Cin. R. R.*, 167 U. S. 479 (17 Sup. Ct. 896, 42 L. Ed. 243). But it had no power to issue general orders in relation to carriers. *Tex. R. R. v. I. S. C. C.*, 162 U. S. 197 (16 Sup. Ct. 666, 40 L. Ed. 940).

From the mere fact that the defendant company filed its schedule of rates as required by law, no inference arises that the Commission agreed to these rates, or to all the proposed conditions of shipment. This rule is imperative, as we think, when applied to contracts or conditions against public policy, or contrary to the general law. It is said that the Commission has given its sanction to valuation clauses, such as the one relied upon in various cases; but it is not contended that it has ever approved the one relied upon by appellant, and there is reason to believe that it will not give its sanction to such a valuation as is relied upon in the instant case. That valuation is arbitrary, is one fixed by the carrier on its own motion, and gives the shipper no other option than to agree upon a valuation, not exceeding \$10 per head, or pay a higher rate, which is not shown by the answer to be reasonable. Generally speaking, those courts which have approved limitations as to the amount of recovery in case of loss have done so upon the theory that there has been a *bona fide* agreed valuation between the shipper and the carrier, based upon the rate to be charged, and not a mere arbitrary limitation to a stipulated amount. See *U. S. Co. v. Backman*, 28 Ohio St. 144; *Hart v. Railroad*, 112 U. S. 331 (5 Sup. Ct. 151, 28 L. Ed. 717); *Kansas R. R. v. Simpson*, 30 Kan. 645 (2 Pac. 821, 46 Am. Rep. 104); *Moulton v. St. Paul R. R.*, 31 Minn. 85 (16 N. W. 497, 47 Am. Rep. 781); *Georgia R. R. v. Keener*, 93 Ga. 808 (21 S. E. 287, 44 Am. St. Rep. 197).

An eminent text-writer has stated the rule, as we understand it, in the following language:

Where, however, the valuation is an arbitrary one, made by the carrier, or the latter thus seeks to escape liability for its own negligence beyond the amount fixed, and such amount is obviously much less than the true value of the goods, a different question arises. An arbitrary and unreasonable limitation, inserted in a bill of lading by the

carrier, without any request or notice to the shipper, and without consideration or an opportunity to obtain a lower rate of freight in consideration thereof, is not binding upon the shipper. Some of the authorities cited in support of this proposition go still further, and seem to hold that the valuation must be made by the shipper; but there is conflict upon this point, and it is held in a leading case, and others which follow it, that it is immaterial whether the shipper fixes the value or not, so long as he agrees to it by accepting the bill of lading without objection. The most stubborn conflict among the authorities, however, is upon the question of the validity and effect of such a valuation and limitation where the carrier is guilty of negligence. But we believe that most of the apparently conflicting decisions can be reconciled in accordance with the following rules: (1) A *bona fide* contract, fairly made in advance, upon sufficient consideration, fixing the value of the property, or the rule for ascertaining its value in case of loss or injury, even if the carrier is guilty of negligence, is valid and enforceable, and, if based upon a lower rate of freight in proportion to the decreased liability, 'will be upheld as a proper and lawful mode of securing a due proportion between the amount for which the carrier may be responsible and the freight he receives, and of protecting himself against extravagant and fanciful valuation.' (2) A stipulation arbitrarily limiting the amount of recovery, in case of the negligence of the carrier, without regard to the value of the property, is invalid, except, perhaps, in the few jurisdictions in which a carrier can contract for an exemption from liability for its own negligence. (3) The agreement as to value must be made in good faith, and not forced upon the shipper by unreasonable rates for a higher valuation. (4) A carrier may make reasonable regulations, graduating its compensation according to the value of the property, and requiring a disclosure of such value for the purpose of fixing its compensation, and providing that in case of the failure of the shipper to disclose the value as required it shall be deemed not to exceed a certain specified sum. (5) If the shipper, upon inquiry duly made by the carrier as to the value of the goods, gives a false valuation, in order to obtain reduced rates, and deceives the carrier thereby, he will be estopped by his

fraud from claiming and recovering any greater amount in case they are lost or injured. 4 Elliott on Railroads, section 1510.

But we need not speculate upon this, for it is not contended that the stipulations in question have ever been approved by the Commission. It will be observed that the action is bottomed upon negligence, and that for present purposes it must be assumed that the loss which plaintiff suffered was due to defendant's negligence. It must also be assumed that the carrier arbitrarily fixed the maximum value of the animals shipped, and that the shipper had no option but to accept this arbitrary valuation, or to pay a higher rate. The reasonableness and justness of this higher rate is not shown, but assumed without any showing of record as to what it is. Consideration should also be given to the fact that it is not an action in which any complaint is made of the rate as fixed. The gist of the complaint is defendant's failure to perform its common law and statutory duty; that is to say, negligence. Fundamentally defendant is relying upon a contract limiting its liability for that negligence, and in order to do so it must present such a contract as the courts will approve. The principal case relied upon by appellant is far from being conclusive. That case was an action to recover for alleged overcharge and for exactions which were alleged to be unreasonable, and the opinion written by the present Chief Justice is far from controlling on the proposition now before us. The case is *Tex. R. R. Co. v. Abilene Co.*, 204 U. S. 426 (27 Sup. Ct. 350, 51 L. Ed. 553). That decision, it seems to us, goes no farther than to hold that a shipper can not maintain an action to obtain relief from an alleged unreasonable freight rate, exacted from him for an interstate shipment, where such rate has been filed with the Interstate Commerce Commission, and promulgated as provided by the act to regulate commerce. The question in the instant case is not one primarily of rates, but of

the right of the carrier to limit its liability for negligence. Of course, it is permissible to draw analogies from the cited case; but there is nothing in the decision which holds to the doctrine that the Interstate Commerce Commission has, either expressly or impliedly, ratified and approved such contracts as are here involved. Our conclusions find support in *Latta v. Chicago, St. P., M. & O. R. R.*, 172 Fed. 850 (97 C. C. A. 198).

II. It is argued, however, that our construction of the law affords a ready means whereby rebates may be offered to shippers, and that for this reason it should not be adopted. This argument, while plausible,

3. SAME: inter-  
state ship-  
ments: con-  
tract liability:  
invalidity: ef-  
fect.

is not persuasive. Of course, there are many devices which might be adopted in order to avoid the law against rebates and discriminations; but it seems to us that in upholding the stipulations relied upon in this case we would point the way to unlawful discrimination in rates quite as effectively as by denying the validity thereof. It must be assumed, in solving the question now before us, that plaintiff suffered a loss to the extent claimed, and that defendant is relying upon a contract limiting its liability for such loss. No rebate is being granted to the shipper, either directly or inferentially. Compensation for his loss is all he seeks, and is all that has been awarded. No discrimination was intended in granting him the rate which was charged, and, even if that had been the intent, we doubt whether the defendant is in position to avail itself of such discrimination, in an action against it for negligence. Even if fraud on the part of the shipper is charged, it is unavailing under the rule announced in *Winn v. Am. Exp. Co.*, *supra*. See, also, *Betts v. Railroad*, 150 Iowa, 252. It is not alleged that the rate given the plaintiff was discriminatory in character, or that it was unreasonable. The sole defense is that he agreed to a limitation upon the carrier's liability in case of injury to the property,

even if such injuries were due to negligence; and it is argued that such agreement is good, because the Interstate Commerce Commission approved thereof, or so treated the schedule filed as to ratify, not only the rate, but all proposed stipulations and agreements contained in the contracts entered into between the carrier and the shipper, or embodied in the bill of lading issued by the railroad company. There is, as we think, no merit in the contention that a rebate or concession has been granted to the shipper. Cases relied upon by appellant in support of its present contention are not in point.

III. Suggestion is made that our construction of the law gives to plaintiff a less rate than that required by law, due to the filing of defendant's schedule of rates. For

4. SAME.      some purposes this may be assumed; but it does not follow that the penalty is a forfeiture on the part of plaintiff of all damages sustained by him, or necessarily limits the amount of recovery. The thought is, of course, worthy of consideration in arriving at a proper decision as to the effect to be given the stipulations in question, but it is not controlling. After all is said, we think the inquiry is limited to a question of law, independent of the schedules filed. If the stipulations relied upon are invalid, either by statute or at common law, and if the state has power to enact such a statute as section 2074 of our Code, then it must be assumed that the Interstate Commerce Commission did not approve of the conditions or limitations contained in the defendant's bill of lading or shipping contracts. Congress had not assumed to legislate upon the subject of the legality of these contracts, and the field is open to state action, unless the interstate commerce act is to be so construed as to forbid all action by the states with reference to the validity of contracts entered into by shippers and carriers within their respective jurisdictions. We do not believe that this construction should be placed upon the interstate commerce act, and

it is certainly true that the Supreme Court of the United States has not yet announced such a doctrine. That the Congress of the United States might do so in all cases of interstate shipment we have no doubt; but until it does the matter is unquestionably left to state control. Finally, it must be remembered that the question of rates for an interstate shipment is only incidentally involved; that the action is not to recover an overcharge, or to have a readjustment of rates; that the contract provisions relied upon have never been expressly approved by Congress or the Interstate Commerce Commission; that the question is one of general law, and goes simply to the inquiry. Are the conditions and stipulations relied upon valid limitations upon plaintiff's right to recover for negligence? We might well have treated the question as settled by *Winn v. Express Co.*, *supra*, but the argument now presented contains some new phases, which we thought well to consider, and the propositions decided in the *Winn* case have been elaborated, in order to justify the announcement there made. We are willing to concede the force of appellant's argument, and to agree that the question is by no means free from doubt; but our former decisions are such that, to be consistent, we must hold the stipulations limiting liability invalid, contrary to our statute, and opposed to sound public policy. It may be that there should be a general rule, applicable to all interstate shipments, holding such contracts as are relied upon either valid or invalid, in order that the extent of liability may not depend upon the place of contract; but this suggestion has no doubt occurred to members of Congress, and with full knowledge of the conflict in court decisions they have not seen fit to legislate upon the subject. The matter is still open to state action or inaction, and the courts in the several jurisdictions must either uphold or deny the legal efficacy of contracts limiting liability; the conclusion being dependent upon state statutes, or upon the view entertained by the particular

court of the public policy of such contracts. We are fully committed to the doctrine that such contracts are invalid, and we see no reason for holding that this rule has been abrogated by Congress or by the Interstate Commerce Commission. The ruling on the demurrer seems to be correct, and the judgment must be, and it is, *affirmed*.

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PERRY LEHMAN, by JACOB LEHMAN, his Next Friend, v.  
THE MINNEAPOLIS & ST. LOUIS RAILROAD COMPANY,  
Appellant.

**Railroads: NEGLIGENCE: EXPERIMENTAL EVIDENCE.** Experimental evidence is admissible where the conditions are shown to have been essentially similar. Thus where it was contended in an action for negligent operation of a handcar, that it was thrown from the track by a stick lying across one of the rails, rather than as a result of the negligence charged by plaintiff, it was proper to permit the testimony of a witness in rebuttal that he had run a handcar over iron obstructions of about the same dimension without derailment. The admission of such evidence however is largely a matter of discretion.

**Same: INJURY TO SECTIONMAN: NEGLIGENCE: SUBMISSION OF ISSUES.**  
2 In this action for injury to a section hand by being thrown from a handcar, the evidence is held to justify submission of the issues of the foreman's negligence in placing plaintiff in a dangerous position; in the use of a sail for propelling the car, in view of the condition of the track and velocity of the wind; and in failing to control the speed of the car by means of the brake.

**Same: PROXIMATE CAUSE: EVIDENCE.** Where an efficient cause of  
3 an accident is shown a presumption arises that it was produced in that manner, in the absence of a showing that it was otherwise produced, even though some independent agency may have contributed to the result. Thus where a sectionman was injured by the derailment of a handcar through the negligent use of a sail to propel the same, the jury was justified in finding such to be the cause of the accident although the presence of a stick upon one of the rails may have contributed thereto.

**Same: EXCESSIVE DAMAGES.** A verdict of \$4,500, for permanent in-

4 jury to the limb of a sectionman 19 years of age, earning \$1.40 per day, is held not excessive.

*Appeal from Hancock District Court.*—HON. J. J. CLARK,  
Judge.

MONDAY, NOVEMBER 20, 1911.

ACTION to recover damages for personal injuries received by plaintiff while in defendant's employ as a sectionman, alleged to have been due to the negligence of the section boss in charge of the operation of a hand car on which plaintiff was riding, resulting in the derailment of the car and injury to plaintiff. The jury returned a verdict for the plaintiff for \$6,000. On motion for a new trial, in which various grounds of error were alleged, the court gave the plaintiff the option of accepting a verdict for \$4,500, and, on the acquiescence of plaintiff in this reduction, refused to set aside the verdict as thus modified. The defendant appeals.—*Affirmed.*

*W. H. Bremner and J. E. Wichman (Geo. W. Seevers, of counsel), for appellant.*

*Senneff & Bliss, for appellee.*

McCLAIN, J.—The facts relating to the nature and extent of the accident resulting in the injury to the plaintiff, which the jury may have found as substantially supported by the evidence, were these: Plaintiff, nineteen years of age, under the direction of one Nelson as section foreman, and with the assistance of another sectionman named Willodson, started with a hand car from the car-house at Britt, for the purpose of going in a southwesterly direction on the track of defendant to his place of work. A young lady, Miss Prince, who was teaching at a school-

house south of the town, accompanied them on the car by their assent. As a strong wind was blowing in the general direction in which they were to proceed, they had rigged up a sail upon the car, consisting of canvas attached at one side to a pole about eight or nine feet long, standing up from the car, the other edge being attached to another pole, controlled by a rope, by the loosening or tightening of which the speed of the car might be regulated. The perpendicular width of the canvas was about four feet, and it was placed about six feet above the car. The use of this sail obviated the necessity of working the handles of the car. After they had gone about six hundred feet, and at a place where the track was rough, the car, which had attained a speed of nearly twenty miles an hour, jumped from the track, and plaintiff was thrown off and injured. The grounds of negligence submitted to the jury were that the foreman placed the plaintiff in a position of danger; that he used a sail under improper conditions of the wind and track; that he failed, by the brake or other means, to control the speed of the car, and allowed it to run too fast under the circumstances; and that the track was negligently allowed to be in an unsafe condition for travel with a hand car. The jury was told that if any one of these grounds of negligence was shown to have existed, and to have resulted in injury to the plaintiff, without negligence on his part, he was entitled to recover.

I. There was some evidence tending to show that the car was thrown off the track by a piece of wood about an inch or an inch and one-quarter in diameter, lying across or along one of the rails, and for the purpose of showing that such an obstruction on the rail would not have derailed the car, a witness was called for plaintiff in rebuttal to testify that he had, in operating hand cars, run over obstacles, such as the burrs of bolts, from an inch to an inch and one-quarter thick. He was then asked whether, under such circum-

1. RAILROADS:  
negligence: ex-  
perimental evi-  
dence.

stances, the car jumped the track, and this question was objected to, and, the objection being overruled, the witness answered that it did not. Error is assigned on this ruling, on the ground that the conditions were not so substantially similar as to render testimony of what had resulted when a car ran over a burr competent and material, as tending to show that this car was not thrown off the track by the piece of wood. Cases, relating to experiments made after the happening of an accident, are cited, in which it is said that evidence of such experiments is not competent, unless the conditions under which they are made are substantially similar in material respects to conditions under which the accident happened. We think there may be a material difference between testimony relating to what has happened in the experience of a competent witness under somewhat similar conditions, and testimony as to what happened in a prearranged experiment. However this may be, we think the conditions referred to by the witness were sufficiently similar to those existing at the time of the accident to justify the court, in the exercise of its discretion, in receiving the evidence.

The question raised by testimony tending to show that the car ran over a piece of wood simply involved the effect of an obstruction on the rail of about the same nature as the obstruction afforded by the burrs of bolts over which the witness said he had run cars without their being thrown from the track. Assuming the car to be operated in each case in a proper manner, the testimony would tend to show that a car would not be derailed by such an obstruction. Defendant was attempting to prove that the accident resulted from a piece of wood on the track, and not from any of the causes which plaintiff was seeking to impute to defendant as constituting negligence. It would certainly tend to show that the car was not necessarily derailed by the piece of wood, and the testimony of the witness that cars were not in his experience ever derailed

by such an obstruction would support plaintiff's case. *Heinmiller v. Winston*, 131 Iowa, 32; *Kimball v. Citizens' Gas & Elect. Co.*, 141 Iowa, 632; *Tackman v. Brotherhood*, 132 Iowa, 64; 1 Wigmore, Evidence, section 448. "The admission or exclusion of testimony of this nature is largely a matter of discretion, and, unless it appear that such discretion has been abused to the prejudice of the complaining party, the ruling will not be disturbed on appeal." *State v. Nowells*, 135 Iowa, 53. The cases relied upon for appellant, so far as they seem to have any material bearing on the question, are cases where the appellate court has sustained the action of the lower court in refusing evidence of this character. See *Osborne v. Simmerson*, 73 Iowa, 509; *Randolf v. Bloomfield*, 77 Iowa, 50; *Bach v. Iowa Central R. Co.*, 112 Iowa, 241; *Lake Erie & W. R. Co. v. Mugg*, 132 Ind. 168 (31 N. E. 564). We think the testimony was such as to justify the exercise of the discretion of the trial judge in receiving it.

II. The question as to negligently placing plaintiff in a position of danger was properly submitted to the jury under the evidence; for it appeared that the two safest places on the car under the conditions of its operation with a sail were at the sides, between the handlebars, and that these two places were occupied by Willodson and Miss Prince. Nelson, the foreman, sat on one of the rear corners of the car, and after it started he directed plaintiff to get up in front; whereupon plaintiff took a position standing on the front of the car facing sidewise, and without support, save as he might touch the handle while it was moving up and down. It is not now contended that plaintiff was negligent in standing, and if the position which he took was one of danger, which he would not have been required to occupy, had not Miss Prince been taken as a passenger on the car, then the jury might well

2. SAME: injury  
to sectionman:  
negligence:  
submission of  
issues.

have found that Nelson was negligent in placing plaintiff in a dangerous position.

As to the sufficiency of the evidence to justify the submission to the jury of the issue as to the use of a sail under improper conditions of wind and track, the record shows that at the place where the hand car was derailed the track was rough, and that under the impulse of a very strong wind the car was going at a high rate of speed. The court did not leave it to the jury to say whether the use of a sail was, in itself negligence, but confined the issue to the propriety of its use under the conditions existing. We can not see that in submitting this question there was any error. It might very well be true that the use of a sail would not necessarily constitute negligence, but that its use in a strong wind, so as to cause the car to run at a high rate of speed over a rough track, was such negligence as to render the defendant liable for resulting injuries to the plaintiff. The testimony of witnesses tended to show that, while it was possible to control the speed of the car by slacking the rope of the sail, it was necessary to pay attention to the rope, and slacken it when the wind should hit the sail hard; and it is evident that this kind of a danger—that is, that the wind might strike the sail with so great force as to render the operation of the car in this method unsafe—was a danger which would not have been incident to the operation of the car in the ordinary manner.

The same considerations dispose of the contention that the court should not have submitted to the jury the question of negligence on the part of the foreman in failing to apply the brake, or by the use of other means controlling the speed of the car. The foreman was in control of the rope, and he was the only person who could have reached the brake. If the speed of the car should have been controlled, and could have been controlled by the foreman, then he

was negligent in not so controlling it, and the question was for the jury.

III. The sufficiency of the evidence to support the verdict is questioned for the appellant, on the ground, also, that, even conceding there was some evidence of negligence in each of the three respects above

3. SAME: proximate cause: evidence.

indicated, there was no evidence that the accident was the result of any such negligence. Counsel rely upon a number of cases in which this court has held that the burden is upon the plaintiff, in an action to recover for injuries due to the alleged negligence of the defendant, to show a causal connection between such alleged negligence and the injury, and that it is not sufficient to show that the negligence might have caused the injury, if the circumstances indicate an equal probability that it was due to some other cause. *Neal v. Chicago, R. I. & P. R. Co.*, 129 Iowa, 5; *O'Connor v. Chicago, R. I. & P. R. Co.*, 129 Iowa, 636; *Gibson v. Iowa Central R. Co.*, 136 Iowa, 415; *Tibbits v. Mason City & Ft. D. R. Co.*, 138 Iowa, 178. But in the case before us no other cause than the negligence of defendant is suggested, aside from the fact indicated by some of the evidence that there was a piece of wood on one of the rails; and, as already indicated, there was evidence tending to show that this cause alone would not account for the car leaving the track. "When a cause is shown which might produce an accident in a certain way, and an accident happens in that manner, it is a warrantable presumption, in the absence of showing of other cause, that the one known was the operative agency in bringing about the result." *Brownfield v. Chicago, R. I. & P. R. Co.*, 107 Iowa, 254. "When a probable potential cause is shown, which may be identified as the proximate cause, and made to answer the legal definition of proximate cause by inferences of fact from direct or circumstantial evidence before the jury, the latter may identify this as proximate cause, although strict logic might

discover other causes which the jury might from the same evidence have found to be the proximate cause. In other words, what is the proximate cause of an injury is usually and ordinarily a question of fact, and probative inferences from facts in evidence can not be disposed of by styling them conjectures." *Gould v. Merrill Ry. & Lighting Co.*, 139 Wis. 433 (121 N. W. 161). To the same effect and quite pertinent to this discussion, are the following cases: *Gordon v. Chicago, R. I. & P. R. Co.*, 146 Iowa, 588; *Mittelstadt v. Modern Woodmen*, 143 Iowa, 186; *Bell v. Bettendorf Axle Co.*, 146 Iowa, 337; *Huggard v. Glucose Sugar Refining Co.*, 132 Iowa, 724; *Lunde v. Cudahy Packing Co.*, 139 Iowa, 688; *Griffin v. Boston & A. R. Co.*, 148 Mass. 143 (19 N. E. 166, 1 L. R. A. 698, 12 Am. St. Rep. 526).

The evidence tended to show that the force of the wind operating on a sail would be likely to lift the rear wheels of the car from the track; whereas the position of this car after it left the track seemed to indicate that the front wheels had first jumped from the rails. But we do not regard the evidence as at all conclusive that if the use of the sail under improper conditions occasioned the car to leave the track, the rear wheels of the car would first be thrown off. The result might well have been effected by the condition of the track and the obstruction afforded by the piece of wood. Under the circumstances of the case, it is not therefore conclusive that the negligent operation of the car did not cause the accident. Even though the obstruction of the piece of wood may have contributed to the resulting accident, and caused the front wheels of the car to first leave the rails, nevertheless the negligent operation of the car may have been a condition without which the result would not have happened; if so, the defendant is liable. *Gould v. Schermer*, 101 Iowa, 582.

IV. The damages allowed by the jury and approved by the court to the extent of permitting a verdict to stand

for \$4,500 were not, we think, excessive, in view of the nature of plaintiff's injury. He suffered a fracture in the upper part of the right femur, and after the bone had been set the right leg was at least an inch and a half shorter than the other. This was the condition at the time of the trial. The testimony of the physicians showed that, although in time the discrepancy in length between his two legs would become less, by reason of the dipping down of the hip on the right side, plaintiff will be permanently lame, and to some extent incapacitated for some kinds of physical labor. At the time of the injury he was earning \$1.40 per day, was nineteen years of age, and had an expectancy of forty-three years. Under these circumstances, we are not disposed to interfere with the exercise of discretion by the trial court in fixing the amount of recovery at \$4,500. Substantially equivalent or greater allowances of damages in cases of similar permanent injuries have been sustained in this court. See, by way of illustration, the following cases: *Collins v. Council Bluffs*, 35 Iowa, 432; *Van Winter v. Henry County*, 61 Iowa, 684; *Sprague v. Atlee*, 81 Iowa, 1; *Grannis v. Chicago, St. P. & K. C. R. Co.*, 81 Iowa, 444; *Kroener v. Chicago, M. & St. P. R. R. Co.*, 88 Iowa, 16; *Bryant v. Omaha & C. B. R. & B. Co.*, 98 Iowa, 483; *Harker v. Burlington, C. R. & N. R. Co.*, 88 Iowa, 409. We think we would not be justified, therefore, in requiring a further remission on the part of the plaintiff.

Finding no error in the record, the judgment is affirmed.

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CARRIE GUTTORMSEN, Appellant, v. DRAINAGE DISTRICT  
No. SEVEN AND OTHERS, Appellees.

**Drainage:** ASSESSMENT OF BENEFITS: REVIEW ON APPEAL. The determination by a board of supervisors and the trial court that an assessment of benefits for the construction of a drainage dis-

tract is not excessive will not be disturbed on appeal unless there appears to be a manifest discrepancy or inequality.

**Same: PRESUMPTION: BURDEN OF PROOF.** A presumption obtains in 2 favor of the correctness of an assessment of benefits for the construction of a drainage district, and a property owner has the burden of showing that it is otherwise.

*Appeal from Worth District Court.*—HON. J. F. CLYDE,  
Judge.

MONDAY, NOVEMBER 20, 1911.

THE plaintiff is the owner of land within the limits of drainage district No. 7, in Worth county. The ditch in question was duly constructed, and the several tracts of land in the district were classified and assessed for the costs and expenses of the improvement. The plaintiff, owning six forty-acre tracts, objected to the assessment of her land as excessive, and appealed therefrom to the district court. On trial of said appeal, the district court found against the plaintiff, and confirmed the assessment as fixed by the board of supervisors. From this judgment plaintiff again appeals.—*Affirmed.*

*T. A. Kingland*, for appellant.

*M. H. Kepler*, for appellees.

WEAVER, J.—The appeal involves no question as to jurisdiction or the formal regularity of any of the proceedings for the establishment of the drainage district or construction of the ditch. The sole complaint presented for our consideration is that the sum assessed against the plaintiff's land is excessive and out of proportion to the benefits accruing to it from such improvement. The district appears to include something more than seventy forty-acre tracts, owned by about thirty different persons.

The amount of costs and expenses assessed against each of these tracts, as finally fixed by the board of supervisors, varies from sums which are merely nominal to something more than \$600, while the amounts charged to each of the six forties here particularly in question vary from \$31.66 to \$510.46. On the hearing before the board, the charge upon one tract was reduced from \$347.28 to \$267.28, and upon another tract it was reduced from \$141.43 to \$120.17. Other reductions asked were refused.

Upon trial of the appeal in the district court, plaintiff produced several witnesses, most of whom were members or relatives of her own family, according to whose testimony the amount charged to this land would seem to be out of proportion to the benefits and to assessments made on other tracts more or less similarly situated. On the other hand, the commissioners who reported the assessments testify concerning the methods pursued by them, their observation of the conditions of the several tracts, and their judgment as to the benefits accruing thereto, making a showing which, if true, demonstrates the substantial justice and fairness of the estimates made. As usual, also, there is the testimony of an expert engineer or two on either side. It can serve no valuable purpose for us to recite and discuss the testimony. Each case of this character rests very largely upon the peculiar facts and circumstances surrounding it, and opinions thereon and decisions thereof are usually of little value as precedents. Again, it is always extremely difficult, and in some instances quite impossible, for this court to get from the bald printed record anything like a comprehensive or satisfactory understanding of the topography of the drainage district, or the precise manner and extent to which a given tract is affected by the improvement. Upon these matters, unless the alleged discrepancy or inequality is quite manifest, we are reluctant to interfere with the finding of the board, especially

1. DRAINAGE: assessment of benefits: review on appeal.

where it has had the approval of the trial court. Plaintiff in this case puts much stress upon the comparison which she makes between the assessment against her land, and that which has been levied on others in the same district; but the tracts to which she refers are few, compared with the whole number which are to share this burden, and even as to those particularly described we discern no unfair adjustment, calling for interference by this court. No method can be adopted which will produce absolutely perfect results. Values and consequential damages are at best matter of opinion, on which equally capable and honest witnesses will disagree. The most which may be hoped for is approximate or substantial equality of burden, and this we think has been accomplished.

There is no claim or showing that the commissioners or board of supervisors have acted in bad faith. The presumption is in their favor, and the burden is upon the plaintiff to establish the alleged error in the assessment. Viewing the testimony as a whole, we agree that burden is not so clearly overcome as to call for a reversal of the judgment below. The issue of fact to which we have referred being thus disposed of, the record presents nothing further for our consideration.

The judgment of the district court is therefore *affirmed*.

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MINNEAPOLIS SELLING COMPANY, Appellee, v. R. N.  
COWIN & Co., Appellant.

**Sales: BREACH OF WARRANTY: EXECUTORY CONTRACT OF SALE.** The purchaser of goods with a warranty may retain the goods and sue for breach of the warranty; but where the goods are delivered on an executory contract as to quality, the absence or presence of which can be seen on inspection, the purchase is without warranty, and acceptance without objection relieves the

seller of all responsibility as to quality: As where postal cards were ordered to be manufactured, and it was stated by the salesman that they would be of the quality of a card exhibited to the purchaser but made by another. The purchaser received and sold a large part of the cards without objection. *Held*, that the contract of sale was by description rather than by sample and that failure to make objection precluded the right to damages because of failure to correspond in quality with the card exhibited.

*Appeal from Blackhawk District Court.*—HON. F. C. PLATT, Judge.

MONDAY, NOVEMBER 20, 1911.

ACTION at law to recover the selling price of a quantity of post cards. There was trial to a jury, and at the conclusion of the testimony the court upon plaintiff's motion directed a verdict in their favor. From the judgment entered upon this verdict the defendants have appealed.—*Affirmed*.

*Courtright & Arbuckle and F. S. Merriam*, for appellants.

*Reed & Tuthill*, for appellee.

WEAVER, J.—At the date of the transaction out of which this litigation has arisen, the defendants were proprietors of a news stand in the city of Waterloo, Iowa, and plaintiffs were manufacturers and jobbers of post cards at Minneapolis, Minn. On May 3 and 4, 1907, plaintiffs' traveling representative called upon defendants and solicited their order for cards. On the day first mentioned defendants gave the solicitor an order for certain Christmas goods amounting to \$62.70, over which, as we understand the record, there is no controversy. On the following day defendants gave him another order for 30,000 post cards. These cards were to be decorated with

colored pictures of specified views of scenery in and about Waterloo, to be copied from photographs obtained for that purpose. The cards were manufactured by plaintiffs and shipped in three separate consignments, namely, June 17th, July 1st, and November 19th, following the date of the order. The larger part of the cards was contained in the consignment of July 1st. Upon the account thus created defendants made payments as follows: August 22d, \$50; October 14th, \$50; and November 6th, \$25. The remainder of \$132.70 not being paid on demand therefor, this action was begun at law to recover the same.

Defendants admit giving the orders referred to, but alleged by way of counterclaim that plaintiff's agent negotiating with them for a sale of the post cards produced a sample of the kind of work which plaintiff could or would do for the defendants; that such card so exhibited was "of artistic quality and a character of card which would have been easily and readily salable on the market in Waterloo." They further allege that the cards when made and delivered to them "were imperfect and defective from the standpoint of salability, and the views represented thereon were dim and imperfect," by reason of which they were "inartistic, absolutely unsalable, and of no value whatever."

Giving the evidence its most favorable construction in support of the defense and counterclaim, it tends to show plaintiff's agent displayed to defendant one or more cards which had been made in Germany and said that the cards with which plaintiffs would fill the order given him would be as good or better than those of German make. The cards delivered upon this order, defendants testify, were plainly of quality and finish inferior to the German cards had in view at the time the order was given. The pictures were not composed of as many colors, and the colors were blurred or run together and less distinct in perspective than they should have been to equal the sample, and

according to defendants' testimony had little or no market value.

It is conceded, however, that defendants did sell and dispose of some 13,000 of them. No complaint of the quality or workmanship of the cards appears to have been made to plaintiffs until some time after the last small shipment made in November, 1907. Apparently in the latter part of December, 1907, this last consignment was reshipped to the plaintiffs without any letter of explanation; but plaintiffs refused to receive it. Indeed, no express objection or complaint of the character or quality of the cards is shown until after this action was begun.

The position taken by appellants is that upon the record so made the jury would have been justified in finding that plaintiffs warranted the quality and workmanship of the cards and that the cards were not in fact as warranted. Under such conditions they claim they are entitled to the benefit of the rule which permits a purchaser with a warranty to receive and retain the subject of the purchase and still preserve his right of action for a breach of the warranty. That there is a well recognized rule in this state to the effect here stated is not open to question. 2 Mechem on Sales, section 1811; *Manufacturing Co. v. Huiske*, 69 Iowa, 557; *Aultman v. Thierer*, 34 Iowa, 272.

The serious question at this point is whether, under the facts in the case as stated by defendants themselves, they come within the benefit of the principle which they invoke. Is any warranty shown? The cards which the plaintiffs were to deliver were not then in existence. They were yet to be printed and colored and put in completed shape for the market.

The agreement stated by defendants themselves in their testimony on the trial was in substance an agreement to manufacture and deliver certain specified described goods. Many courts, including this court, have been disposed to draw a distinction between executory contracts of this

character and ordinary executed contracts of sale and warranty, and to hold that representations which might sustain a claim of warranty in cases of the latter kind will in cases of the former class be treated not as warranties, but as what is sometimes denominated "sales by description." *Chandler v. Hopkins*, 4 M. & W. 399; *Allison v. Vaughn*, 40 Iowa, 421; *Hirshorn v. Stewart*, 49 Iowa, 418; *Mackey v. Swartz*, 60 Iowa, 710; *Schopp v. Taft*, 106 Iowa, 612; *Berthold v. Seevers*, 89 Iowa, 506; *Battery Co. v. R. R. Co.*, 138 Iowa, 369.

In cases of this kind it is held that the purchaser is required to inspect the goods, when delivered or tendered for delivery, and if he finds they do not conform in kind or quality or description to the terms of his order or contract he may refuse to accept them and so notify the seller. Failing to do so within a reasonable time, or proceeding to use or sell the property as his own after inspection has disclosed its nonconformity to his order, he is held to waive objection thereto and must pay the agreed price. The writer of this opinion is not impressed with the soundness of this distinction or the logical sufficiency of the arguments by which it is supported, but the court has been too long committed to it to justify us in overruling the numerous precedents to that effect. The most plausible ground for the distinction is in the proposition that an order given for property of a particular kind or description, and particularly where it is contemplated that the article is to be manufactured and prepared for the special purpose of filling the order, the undertaking of the seller with reference to the quality and description of the article is not so much a warranty as a condition precedent to the duty of the purchaser to accept it. If then, when the tender is made of an article differing in any respect from the one ordered, and the defect is plainly apparent upon examination, and purchaser does not insist upon the condition precedent and refuse to accept the tender as a ful-

fillment of the seller's contract, he is held to have admitted the sufficiency thereof and to waive his right to thereafter raise the objection, and the seller is entitled to recover the agreed price.

In *Berthold v. Seevers, supra*, which involves the question we are here considering, this court said: "When goods are delivered on an executory contract requiring a particular quality, the absence or presence of which can be seen on a mere view, in such case the purchase is without warranty, and acceptance without objection leaves the seller relieved of all responsibility for the goodness, quality, or fitness of the property." This fairly sums up the effect of our decisions applicable to the issue here submitted.

In this connection it should be said defendants testify that the inferior quality of the cards delivered to them was clearly visible from the first. They received them without objection or complaint and proceeded to sell nearly half of them before suggesting any dissatisfaction with the purchase. If the rule of our prior decisions is to be adhered to, the trial court did not err in holding it applicable to this situation.

It is to be remembered, also, that in this case the German card exhibited to the defendants was not in any proper sense a "sample," because, as we have noted, the cards to be sold were as yet unmanufactured, and no sample of them either as to kind or quality could be produced. It was rather an exhibit illustrating the quality or excellence of the work plaintiffs claimed they were able to do. The matter of artistic excellence or degree of artistic perfection, which is the question most insisted upon by the defendants, is so much a matter of taste, and taste is so much a matter of education and training, that a promise that a picture to be produced shall be "as good or better" than one which is referred to as a standard can hardly be more than a mere expression of opinion on which no one can be supposed to rely as a warranty.

Millions of the American people, who would look with more or less weariness upon the masterpieces of Raphael, Titian, Turner, and West, discover great merit in the highly colored supplements of their Sunday morning newspapers. Under the golden dome of a Western capitol is a specimen of the painter's art for which the people cheerfully paid many thousand dollars, but the writer has the word of an eminent Scotch-American that in his judgment "it is not worth fifty cents." The same canvas which appeals to one as an excellent portrait by Whistler will be readily recognized by another of less technical learning, but perhaps keener perception, as a graphic portrayal of a Western cyclone.

While the use of the word "warrant" or "warranty" is of course not essential to sustain such a defense or counterclaim, its absence is a circumstance of some significance, and, if the words actually employed are under all the circumstances clearly to be understood as mere expressions of opinion or boastful praise of an article yet to be manufactured, neither the court nor jury is at liberty to treat them as a warranty.

An examination of the record in this case leads us to the conclusion that no express warranty was shown, and that under the rule established by our own cases the facts presented do not call for an application of the law as to implied warranties.

It follows that the judgment of the district court must be *affirmed*.

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ROBERT MILLER and DAVID D. BAKER, Partners doing business as Royal Film Service, v. J. MILOSLOWSKY, Appellant.

**Bailment:** PLEADINGS: VARIANCE. Plaintiff in this action alleged that he leased certain picture films to defendant with the understanding that they should be returned in good condition, and

also alleged negligence in handling the same. Defendant admitted the agreement to return and the case was tried on the issue of negligence. *Held*, that plaintiff was entitled to recover notwithstanding the plea of special contract.

**Same: REASONABLE CARE: BURDEN OF PROOF.** Where property is delivered to a bailee in good condition and is returned in a damaged condition the law presumes negligence, and the burden is upon him to show that he exercised the required care.

**Same: NEGLIGENCE: EVIDENCE.** In this action for injury to moving picture films by a bailee, the evidence is held sufficient to show that they were negligently handled by defendant and to support a verdict for plaintiff.

**Same: EXPERT EVIDENCE.** A witness having had experience in the handling and use of picture films is competent to give an opinion as to what caused the injury to the same.

*Appeal from Polk District Court.*—HON. HUGH BRENNAN, Judge.

MONDAY, NOVEMBER 20, 1911.

ACTION to recover damages to moving picture films. Verdict and judgment for the plaintiffs. The defendant appeals.—*Affirmed*.

*George Wambach*, for appellant.

*N. T. Guernsey* and *C. F. Maxwell*, for appellees.

SHERWIN, C. J.—The plaintiffs herein leased to the defendant certain moving picture films, to be used in the defendant's theaters at Des Moines and Ft. Dodge, and to be returned to the plaintiffs at Chicago.

1. **BAILMENT:**  
pleadings: variance. The films were delivered to the defendant in good order, but when they were received by the plaintiffs upon their return to Chicago they were in a damaged condition, and this suit resulted. The plaintiffs alleged that the films were leased to the defendant

with the understanding and upon the condition that they were to be returned in as good condition as when they were sent out, and the appellant says that there was a variance between this allegation and the proof, and that because thereof there should have been no recovery in this action. Other allegations of the petition, however, charge the defendant with negligence in handling said films, and we are inclined to the view that the petition, as a whole, attempted to charge only negligence as a bailee, and that the allegation of an understanding was the pleading of a presumption, rather than an express contract. But, however this may be, the defendant admitted that he was to return the films within a specified time, and the case proceeded and was fully tried upon the issue of the defendant's negligence in handling said films. And, such being the case, the plaintiffs were entitled to recover under the rule announced in *Cook v. Smith*, 54 Iowa, 636, and many more of our cases, which we need not cite. In any event, there was an allegation of negligence, and the plaintiffs might recover thereon, notwithstanding the plea of a special contract. *Kaline v. Stover*, 88 Iowa, 245.

The claim of the appellant that he was a bailee merely, and was bound to exercise ordinary care only, must be conceded, and we think is conceded by the appellees. But

where chattels are delivered to the bailee in good condition, and are returned in a damaged condition, the law presumes negligence to have been the cause of the damage. *Hunter v. Ricke Bros.*, 127 Iowa, 108; 5 Cyc. 217. And the bailee must then show that he exercised the care required of him by law. *Hunter v. Ricke Bros.*, *supra*.

The appellant is mistaken in the assertion that there was no evidence showing that the defendant was negligent in handling or using the films. The films were securely inclosed when they were delivered to the express company for shipment to the plain-

2. SAME: reasonable care: burden of proof.

3. SAME: negligence: evidence.

tiffs in Chicago, and when they reached there and came into the hands of the plaintiffs the package was unbroken, and evidently in the exact condition that it was in when delivered to the express company by the defendant's agent. It was opened by the plaintiffs, and the films were carefully removed therefrom and examined, and were found to be in the damaged condition complained of. There was also evidence tending to show that the condition in which they were found could only have been produced by negligent use and handling. If the films were in a damaged state when they reached Chicago, and it was apparent that they must have been in the same condition when they were boxed and shipped, the jury was justified in finding that they had been injured through the defendant's negligence, for it was conceded that the defendant received them from the plaintiffs in good condition. What we have already said sufficiently answers the appellant's contention that there was error in the court's instructions. The evidence as to the condition of the package when it reached the plaintiffs in Chicago, and as to the condition of the films when they were removed therefrom, was clearly competent.

The testimony of one of the plaintiffs' witnesses that the "scratches were extended the whole length of the film, showing there was some defect in the machine, the sprocket holes were torn out, showing that the machine had not been properly handled," we think, was properly received. The witness had had long experience with such films, and with their use and handling. In other words, he was an expert in the business, and we think he was shown fully competent to give an opinion as to what caused the injury to the films. Ordinary jurymen know nothing about such matters, or how such films are used or operated. Moreover, the defendant's evidence tended to show that films may be damaged by the use of defective machines and by improper handling. The evi-

4. SAME: expert evidence.

dence sustains the verdict, and the judgment should be, and it is, *affirmed*.

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E. B. LANE, Appellant, v. T. I. MITCHELL and Others.

**Elections: CHALLENGE OF VOTER: DUTY OF JUDGES.** The duties of  
1 judges of election are ministerial and not judicial, insofar as  
they relate to administering the oath to a challenged voter and  
receiving his ballot; and the judges can not arbitrarily refuse  
to administer the oath or receive the ballot after it has been  
administered.

**Same: DAMAGES FOR REFUSAL OF RIGHT TO VOTE.** Damages for refus-  
2 ing to administer the oath and receive the ballot of a qualified  
but challenged voter, when the refusal is wilful and malicious,  
are not necessarily nominal only, but may be substantial.

*Appeal from Linn District Court.*—HON. W. N. TREICHLER,  
Judge.

MONDAY, NOVEMBER 20, 1911.

SUIT for damages against judges of election, who refused to receive the plaintiff's vote at a general election. There was a directed verdict for the defendants. The plaintiff appeals.—*Reversed*.

*Redmond & Stewart*, for appellant.

*Chas. W. Kepler & Son*, for appellees.

SHERWIN, C. J.—At the time of the November, 1908, general election, the plaintiff was a student of Cornell College, Mt. Vernon, Iowa, and the defendants were judges of said election in Mt. Vernon precinct. The plaintiff presented himself at the polls at the proper time, and demanded a ballot for the purpose of voting. He was refused a ballot, whereupon he demanded that the statutory oath

be administered to him, and that he thereafter be permitted to vote. The defendants refused to administer the oath, and the plaintiff was not allowed to vote. He brought this action to recover damages, alleging malice on the part of the defendants. The trial was to a jury, but after the close of the evidence on both sides the court directed a verdict for the defendants, and rendered a judgment thereon against the plaintiff for costs. Counsel have devoted much time to the question whether the plaintiff showed himself entitled to vote in Mt. Vernon. The residence of a person depends very largely upon his intent, and under the record presented here we have no hesitancy in holding that the questions of fact should have gone to the jury. As we have already said, the plaintiff insisted that he be sworn, as provided by section 1115 of the Code, and that he be thereafter allowed to vote. The section provides as follows:

Any person offering to vote may be challenged as unqualified by any judge or elector; and it is the duty of each of the judges to challenge any person offering to vote whom he knows or suspects not to be duly qualified; and he shall not receive a ballot from a voter who is challenged until such voter shall have established his right to vote. When any person is so challenged, the judges shall explain to him the qualifications of an elector, and may examine him under oath touching his qualifications as a voter. In all precincts where registration is not required, and in other precincts where the name of such voter is entered upon the registration lists, if the person challenged insists that he is qualified, and the challenge is not withdrawn, one of the judges shall tender to him the following oath: 'You do solemnly swear that you are a citizen of the United States, that you are a resident in good faith of this precinct, that you are twenty-one years of age as you verily believe, that you have been a resident of this county sixty days, and of this state six months next preceding this election, and that you have not voted at this election,' and if he takes such oath, his vote shall be received.

We are of opinion that the duties and powers con-

ferred by this section on judges of election are ministerial, and not judicial, and that the judges can not refuse to administer the oath therein provided, or refuse to receive the ballot after the oath has been taken. The Constitution of the state provides that the citizen fulfilling the stated conditions of age, citizenship, and residence shall be entitled to vote at all elections authorized by law, and such provision undoubtedly leaves it to the Legislature to regulate the exercise of the right, and to provide a method for determining whether persons offering to vote possess the required qualifications. *Edmonds v. Banbury*, 28 Iowa, 267. But neither the section of the statute under consideration, nor any other section, so far as we are advised, confers upon the election judges the power to reject a tendered ballot where the person offering to vote tenders the general oath therein provided for. It is provided that any elector or one of the judges of the election may challenge the person offering to vote, and, where that is done, it then becomes the duty of the judges to withhold the ballot until such voter shall have established his right to vote; and for the purpose of so establishing his right it is provided that the judges shall explain to him the qualifications of an elector, and the judges may examine him under oath touching his qualifications, if they so desire. If, after such examination, the judges conclude that the voter is qualified, he is permitted to vote without further action on his part, and the general oath is not then required. But, if after such examination, the judges conclude that the voter is not entitled to vote, and he still insists that he is, the law says that the general oath therein provided shall be tendered him by one of the judges, and, if he takes such oath, his vote shall be received. This language is clear and explicit, and leaves no discretion with the judges when the voter has complied with the terms of the statute. While the judges are required to make a preliminary test of qualifications and are

1. ELECTIONS:  
challenge of  
voter: duty of  
judges.

given some discretion relative thereto, when the final test provided by the statute is offered, or when it is applied, no discretion is left with the judges, and they must receive the ballot. There are weighty reasons why this should be so; and it is the general rule. The constitutional right to vote is of high value to voters generally, and they should not be deprived of it, except after full investigation by a tribunal with authority to make such an investigation. An election board has no power to, and manifestly could not, call witnesses and enter upon a trial of the right; hence, the legislative provision for a final test at the polls, and the requirement that the ballot be received when such test is taken.

Judge Cooley, in his work on Constitutional Limitations (6th ed.), page 776, says: "Where, however, by the law under which the election is held, the inspectors are to receive the voter's ballot, if he takes the oath that he possesses the constitutional qualifications, the oath is the conclusive evidence on which the inspectors are to act, and they are not at liberty to refuse to administer the oath, or to refuse the vote after the oath has been taken. They are only ministerial officers in such case, and have no discretion but to obey the law and receive the vote." It is so held in *People v. Bell*, 119 N. Y. 175 (23 N. E. 533); *People v. Pease*, 27 N. Y. 45 (84 Am. Dec. 242); *Spragins v. Houghton*, 3 Ill. (2 Scam.) 377; *State v. Robb*, 17 Ind. 536; *Wolcott v. Holcomb*, 97 Mich. 361 (56 N. W. 837, 23 L. R. A. 215); 15 Cyc. 367, and cases cited. And such was also the holding in *Ashby v. White*, 8 State Trials, 89 (Eng.) 2 Ld. Raym., and in *Gillespie v. Palmer*, 20 Wis. 544; 10 Am. & Eng. Ency. of Law, 668. The appellees rely upon *Vanderpoel v. O'Hanlon*, 53 Iowa, 246, as controlling this case on the facts, but the facts are not the same in both cases; and hence, that case does not necessarily control this one. The statement of the issues in that case indicates that the voter took the oath and ten-

dered a ballot, but the statute we have discussed, which is the same as sections 619 and 620 of the Code of 1873, was not referred to in the opinion, and the decision is not, therefore, inconsistent with our present conclusion as to the duty of the election board.

The appellees also say that there should be no reversal, because, if the plaintiff was entitled to recover, his recovery could be of nominal damages only. But it is not true,

2. SAME: damages for refusal of right to vote. as a matter of law, that only nominal damages can be recovered in a case of this kind.

If a wilful and malicious wrong was done the plaintiff under such circumstances as to entitle him to actual damages, it does not necessarily follow that his recovery can be for nominal damages only, even though such actual damage may not be susceptible of exact calculation. *Long v. Long*, 57 Iowa, 497.

The plaintiff alleged that the defendants acted wilfully and maliciously in refusing to swear him and to accept his ballot, and, if that was found to be true, the jury would have been warranted in awarding the plaintiff a substantial recovery. While the election board should have received the plaintiff's ballot upon his taking the prescribed oath, there can be no recovery against the board for refusing to receive his ballot, unless the plaintiff shows that he was a resident of Mt. Vernon and entitled to vote there at the time in question. As we have already said, the court should not have held as a matter of law that the plaintiff was not a resident, and hence not entitled to vote, but should have submitted that question to the jury. The judgment must therefore be *reversed*.

FARMERS SAVINGS BANK V. R. H. ALDRICH, H. O. PETERSON, THOMAS APELAND and GEORGE NERNES, Appellants.

**Equitable actions: EXAMINATION OF ACCOUNTS.** An action to set  
1 aside a settlement for misappropriated funds, involving an examination of mutual accounts with several defendants, is one of equitable cognizance, and a transfer of the case to the law docket to determine the amount due from defendants to plaintiff was properly overruled.

**Joint wrongdoers: RELEASE: CONSTRUCTION.** In this action it ap-  
2 peared that plaintiff settled with certain persons, not parties hereto, but jointly interested in the misappropriation of its funds, and gave them a written release from further liability, which is set out in the opinion; and it is held that the release is unconditional and does not expressly reserve the right to look to others for further misappropriated funds, although reciting that the sum received is to apply on the misappropriated fund.

**Same: RELEASE OF ONE JOINT WRONGDOER: APPLICATION OF RULE.** The  
3 rule relating to the effect of a release of one joint wrongdoer upon the liability of others applies to all cases where one may look to two or more persons charged with a joint wrong, whether growing out of breach of contract or tort.

**Same: INTENT OF PARTIES: PAROL EVIDENCE.** The effect of a settle-  
4 ment with one joint wrongdoer is to be determined by the intent of the parties, and this is not dependent solely upon the language of a receipt in connection therewith, but may be shown by parol evidence. In the instant case parol evidence was admissible as the instrument relied upon as a release of other joint wrongdoers is held to be no more than a receipt.

**Same: SETTLEMENT WITH AND RELEASE OF ONE WRONGDOER: EFFECT.**  
5 Where there is a common liability on the part of two or more wrongdoers, and settlement is made with one on consideration of such liability and its extent, the claimant can not, by an express or implied reservation of the right to recover an additional amount from the others on account of the same liability, defeat the effect of the release given the one with whom he settles, but all are released thereby.

*Appeal from Story District Court.*—HON. CHAS. E. ALBROOK, Judge.

MONDAY, NOVEMBER 20, 1911.

THIS is an action to recover the funds of the bank, alleged to have been misappropriated by defendant Aldrich, its cashier, in conjunction with the other defendants, in bucket shop transactions. Judgments were rendered against defendants in different amounts, and the defendants, other than Aldrich, appeal from the judgments rendered against them respectively.—*Reversed.*

*John G. Myerly, Ole O. Roe, and McCarthy & Luke,* for appellants.

*Samson & Noble and Fitchpatrick & McCall,* for appellee Farmers' Savings Bank.

*E. H. Addison,* for appellee Aldrich.

McCLAIN, J.—Prior to June 1, 1908, defendant Aldrich had been the cashier of the plaintiff bank, and on that date he retired from that office, making a settlement which the plaintiffs now allege to have been obtained by fraud in using false records and forged notes. It is admitted that for criminal conduct in connection with the business of the bank Aldrich was indicted, and, on being put on trial, pleaded guilty, and was sentenced to the penitentiary, where he is still confined. A subsequent investigation disclosed his indebtedness to the bank, in a sum exceeding \$10,000, for misappropriation of funds. Judgment was rendered against Aldrich in the lower court for substantially the entire amount of this misappropriation, and he has not appealed. But the plaintiffs also allege that certain portions of the misappropriated moneys were used

by the other three defendants, respectively, in partnership transactions with Aldrich, which may be sufficiently described as bucket shop transactions, carried on through Harper & Ward, of Des Moines, who received the funds misappropriated in such transactions; and the plaintiff seeks to recover from each of said defendants, as portions of a trust fund misappropriated by Aldrich, the amounts paid to Harper & Ward in the partnership business. Said defendants deny, respectively, the partnership arrangements alleged by plaintiff, and deny any knowledge that Aldrich was carrying on bucket shop transactions in their names and for their benefit, and was using the plaintiff's money for the purpose. Defendants also rely upon a settlement with Harper & Ward as constituting a release of each of them from liability. The trial court held that the settlement with Harper & Ward did not constitute a release, and found on the issue of fact that each of the defendants authorized Aldrich to conduct the bucket shop transactions in their respective names, and rendered judgments against them, respectively, for the sums of money found to have been advanced from the funds of the bank to carry out the respective partnership arrangements.

I. A motion to transfer the case to the law docket for determination of the amount due by the defendants, respectively, to the plaintiff bank was overruled, and defendants assign error on this ruling. In view of the fact that the action was brought in equity to set aside the settlement with Aldrich on the ground of fraud, that the issues raised involved an examination of mutual accounts of payments to Harper & Ward and credits to the several defendants for profits alleged to have been realized in the various transactions, and that the purpose of the entire action was to recover trust funds misappropriated by Aldrich through the connivance of the other defendants, and for their

1. EQUITABLE  
ACTIONS: ex-  
amination of  
accounts.

benefit, we think the court properly refused to hold that the case was not one of equitable cognizance.

II. After the officers of the bank had discovered the misappropriation of its funds, by their use in carrying on bucket shop transactions with Harper & Ward, negotiations were instituted by them looking to the return by Harper & Ward of the bank's funds employed in such transactions. Harper & Ward finally suggested the payment of \$2,000 by them as a settlement. Later the president and attorney for the bank suggested that the claim might be settled for \$6,000. Then, after several further meetings, Harper & Ward offered \$4,000 to compromise the claim, and this offer was accepted and the money paid. Before this offer was accepted, the representatives of the plaintiff had dropped to \$5,000. The negotiations had extended over a period of about six months, and the final settlement was in the nature of a release of Harper & Ward, so far as any further obligation to the bank was concerned. In connection with the settlement, but not as a part of it, so far as Harper & Ward were concerned, it was stated that the intention of the officers of the bank was to proceed against the other parties. The consummation of the settlement was by an instrument in writing, as follows:

Des Moines, Ia., Oct. 1, 1909. This is to acknowledge receipt of the sum of four thousand dollars from the firm of Harper & Ward to apply on sums of money belonging to the undersigned bank and misappropriated by Ralph H. Aldrich, formerly cashier of said bank; said bank reserving the right to apply the said four thousand dollars as it shall choose to apply the same, except that it shall not be applied to any portion of the indebtedness of said Ralph H. Aldrich to said bank by reason of the sums so misappropriated for which the bank has been reimbursed by the sum received from the surety on the bond of said cashier to said bank. In consideration of said four thousand dollars said bank agrees that it will not now nor at any time hereafter make any further demand upon said

2. JOINT WRONG-  
DOERS: re-  
lease: con-  
struction.

Harper & Ward because of any such misappropriations, nor by reason of any business, trades or transactions between said Ralph H. Aldrich and said Harper & Ward either for himself personally or in behalf of others. The undersigned officers of said bank hereby represent that they have due and full authority to receive said funds and make this agreement on behalf of the bank. Farmers' Savings Bank of Huxley, Iowa, by O. J. Kalsem, President. Peter B. Brown, Director.

The only words in this instrument indicating that it was not to constitute a full settlement with Harper & Ward, not only for their benefit, but for the benefit of all persons liable with them for the misappropriation of the money which had come into their hands, are those indicating that the amount received was "to apply on" the claim of the money so misappropriated, instead of being in full satisfaction thereof; but the release is unconditional, and there is no express reservation of any right to look further to other persons liable for the misappropriation. We think the question is therefore squarely raised whether the release of one wrongdoer constitutes a release also of others jointly liable with him for the wrong.

Counsel for appellee contend that these appellants and Harper & Ward were not joint wrongdoers, and therefore the rule as to the effect of the release of one joint tortfeasor upon liability of others, has no application. But as we understand the rule it is not strictly limited to cases of wrongs against the person or against tangible property. It is applicable in every case where one person may look to two or more, charged with a wrong jointly, or jointly and severally, and it is applicable as well in cases of breach of contract. *Turner v. Hitchcock*, 20 Iowa, 310, 323. The plaintiff bank was asking to recover money misappropriated by its cashier, and this misappropriation consisted in paying the money to Harper & Ward. The connection of the appellants with the transaction was in pro-

3. SAME: release of one joint wrongdoer: application of rule.

curing, or assisting, or profiting by such payment. None of the money passed through their hands, and they received no money from Harper & Ward. It is true, checks for alleged profits were made out, payable to appellants, but they were delivered to Aldrich, and by his own indorsement of the names of appellants turned over to the bank, which received the money. It is a question under the record whether the use by the cashier of the names of the appellants in making such indorsements was authorized by the relations which the cashier had reason to understand existed between him and each of the appellants. It is sufficient now to say that it is perfectly clear that if the bank had any claim whatever against Harper & Ward it had a claim for the entire amount of money paid to that firm out of the bank's funds, deducting the amounts returned to the bank, whether regularly or irregularly, by means of checks or drafts, for supposed profits or money advanced by the firm to the cashier and used for the benefit of the bank. There is not the slightest doubt, therefore, that in settling with Harper & Ward the bank was attempting to settle a claim for the same money which it is now demanding from the appellants. Under these circumstances the appellants and Harper & Ward were, on plaintiff's theory, jointly and severally liable for the misappropriation of the money; that is to say, the claims against the respective appellants were also claims against Harper & Ward.

There is some question among counsel as to whether the effect of this settlement is to be determined solely by the language used in the receipt, or by the intention of the parties as disclosed by parol evidence. On this point we easily reach the conclusion that the intent of the parties should govern. A receipt is not a contract, and other evidence is always admissible to show what was its purpose.

4. SAME: intent  
of parties:  
parol evidence.

With reference to the application of the rule that the

release of one joint tort-feasor extinguishes the liability of others, the courts have always looked to see what the purpose of the parties really was, as indicated, not only by the language of the release, but also by the character of the negotiations, preserving, of course, the rule that parol evidence is not admissible to vary the terms of a written contract. The instrument above set out does not purport to be a contract, but only a receipt, and, although it states the terms upon which the settlement was made, we think that other evidence as to the intention of the parties was admissible. The entire negotiations between plaintiff and Harper & Ward related, however, to the amount which the latter should pay to be released from further liability, and an intimation on the part of the representatives of the bank that they might subsequently attempt to hold the appellants liable would not affect the character of the transaction as constituting a complete release of Harper & Ward.

There is an irreconcilable conflict in the authorities as to what constitutes such release of the one joint tort-feasor as to bar further claims against the others. It is agreed,

on the one hand, that a simple release, with-  
 5. SAME: settle-  
ment with and  
release of one  
wrongdoer: ef-  
fect. out more, constitutes a complete satisfaction  
 of the entire claim; while, on the other hand,

it is well settled that the claimant may enter into a covenant with one tort-feasor, on a good consideration, not to sue him without barring his claim as to others. The rule as to the effect of a release may at one time have been somewhat technical; but it has been observed and acted upon, not as a technical rule of the common law, but for reasons of sound policy. A claimant should not be allowed to settle with one of the persons liable to him for his entire claim, if it is valid, and then, having received all he has been able to exact from such party, proceed to speculate by litigation with others, who were no more liable than the first. On the other hand, a claimant may have good grounds for refraining from suing one of the parties liable, and

giving to such party an assurance that he will not further be molested, and seeking his entire redress from others, who are equally liable. The exact divergence between the authorities, as we understand it, is this: Some courts hold that if the transaction is in effect a release the result is to release all, notwithstanding an attempt to reserve a right of action against others; while other courts hold that a release in form, with a reservation of the right to sue others, is in effect nothing more than a covenant not to sue the one released. The weight of authority in this country seems to be unquestionably in support of the rule that an adjustment with one wrongdoer, and his release from all further liability, discharges all the joint wrongdoers, even though there is a reserved intention, either expressed or implied, to look to the other wrongdoers for further damages or compensation. *McBride v. Scott*, 132 Mich. 176 (93 N. W. 243, 61 L. R. A. 445, 102 Am. St. Rep. 416); *Abb v. Northern Pacific R. Co.*, 28 Wash. 428 (68 Pac. 954, 58 L. R. A. 293, 92 Am. St. Rep. 864); *Ellis v. Bitzer*, 2 Ohio, 89 (15 Am. Dec. 534); *Ayer v. Ashmead*, 31 Conn. 447 (83 Am. Dec. 154); *Seither v. Philadelphia Traction Co.*, 125 Pa. 397 (17 Atl. 338, 4 L. R. A. 54, 11 Am. St. Rep. 905); *Mitchell v. Allen*, 25 Hun (N. Y.), 543; *Brogan v. Hanan*, 55 App. Div. 92 (66 N. Y. Supp. 1066); *Wallner v. Chicago Consolidated Traction Co.*, 245 Ill. 148 (91 N. E. 1053). Text-writers in general support this view. 1 Cooley, Torts (3d ed.), 235; 1 Kinkead, Torts, section 63. And see note in 1 Am. & Eng. Ann. Cas. 63. In support of the other view, see *Ellis v. Esson*, 50 Wis. 138 (6 N. W. 518, 36 Am. Rep. 830); *Musolf v. Duluth Edison Elec. Co.*, 108 Minn. 369 (122 N. W. 499, 24 L. R. A. (N. S.) 451); *Edens v. Fletcher*, 79 Kan. 139 (98 Pac. 784, 19 L. R. A. (N. S.) 618); *Gilbert v. Finch*, 173 N. Y. 455 (66 N. E. 133, 61 L. R. A. 807, 93 Am. St. Rep. 623); *Hirschfield v. Alsberg*, 47 Misc. Rep. 141 (93 N. Y. Supp. 617).

In the New York case of *Gilbert v. Finch*, just cited, the conflict in the authorities in that state and elsewhere is to some extent discussed, but the conclusion of the court is based on a New York statute, and in some other states there are statutes affecting the question. Many more cases might be cited on either side, but without profit, for in the recent cases above referred to the authorities are fully collected. In this state the first announcement on the subject is in *Turner v. Hitchcock*, 20 Iowa, 310. It is there said that a release of one joint tort-feasor constitutes a satisfaction as to all, by operation of law, and the court cites with approval the early Ohio case of *Ellis v. Bitzer*, *supra*, which is generally regarded as one of the early leading cases in this country on the subject. The court was divided as to the result to be reached, but not on this proposition. In *Bell v. Perry*, 43 Iowa, 368, some doubt was expressed as to the correctness of the view announced in *Ellis v. Bitzer* and *Ayer v. Ashmead*, but the case was one relating to the dismissal of a suit against one joint tort-feasor on payment of costs, and is not therefore directly in point. In *Miller v. Beck*, 108 Iowa, 575, it was intimated that if the apparent intention is not to release or discharge the debt, but to release only one of the wrongdoers from his liability, the effect is only that of a covenant not to sue, and the others remain liable, citing *Ellis v. Esson*, *supra*; but the case related to the recovery of damages for separate attachments, and it was not contended that the entire damages for either one covered all the damages suffered from the other, and it was held that the attaching creditors were not joint wrongdoers. In *Snyder v. Mutual Telephone Co.*, 135 Iowa, 215, it was held that where the plaintiff entered into a voluntary settlement, for a substantial consideration, with one charged as a wrongdoer, and released such wrongdoer on payment of an amount received in full of all claims against it for damages, others, charged as wrongdoers, were necessarily re-

leased, although there may have been an intention in the settlement to seek further recovery against another. It is apparent, therefore, that this court has not as yet committed itself in any pertinent case unequivocally to either line of decisions.

We now reach the conclusion, however, that where the matter in controversy with one of two or more alleged wrongdoers is as to a liability common to all of them, and the settlement is made on considerations relating to the existence of such liability and its extent, it is not competent for the claimant, by expressly or impliedly reserving the right to recover an additional amount from the others on account of the same liability, to defeat the effect of the release which he gives. This conclusion seems particularly applicable to the case now under consideration. If plaintiff's money was misappropriated by the cashier through any arrangement with appellants and for their benefit, then Harper & Ward received the entire fund thus misappropriated. It would certainly be unreasonable to hold that plaintiff, pursuing the fund into the hands of Harper & Ward, should not recover all thus misappropriated. Apparently plaintiff attempted to do so, and agreed with Harper & Ward as to the amount. Plaintiff ought not now to be allowed to contend that it got from Harper & Ward only a portion of the fund thus misappropriated, and insist on the payment of the balance by these appellants. There is no suggestion that Harper & Ward were not pecuniarily responsible, and might not have been compelled, in proper action, to respond to the extent of the entire amount misappropriated by the cashier by connivance with and for the benefit of these appellants.

As a good defense was therefore made out for the appellants, it is not necessary to consider the questions elaborately argued as to whether appellants were in fact wrongdoers, and whether all the advancements from the

bank's funds to Harper & Ward were on their several accounts.

The judgment of the trial court is therefore *reversed*.

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FIRST NATIONAL BANK OF WILMOT, MINNESOTA, Appellant, v. A. EICHMEIER and KATIE EICHMEIER.

**Appeal:** DELAY IN FILING ABSTRACT. Delay in filing an amendment  
1 to an abstract, not the fault of appellee and from which no prejudice results, will not be stricken because of the delay.

**Same:** SERVICE OF NOTICE: RECORD EVIDENCE. The recital in a judgment  
2 ment that a party appeared to the action by counsel and in person is conclusive that notice of appeal was served upon such party, as against the denial, unsupported by affidavit, that the counsel acknowledging service of notice of appeal was not such counsel.

**Same:** AMENDMENT OF ABSTRACT: WAIVER OF DEFECTS<sup>o</sup> IN RECORD. In  
3 filing an amendment to the abstract the appellee does not waive objections to alleged defects in the preservation of the record, but he may amend subject to the ruling on the denial that the evidence was ever filed or properly certified.

**Same:** ESTABLISHMENT OF THE RECORD. The court has authority to  
4 establish the record of a cause as it originally existed at any time: Thus where the certificate attached to the shorthand report was inadvertently removed and a substituted certificate, neither entitled, dated nor signed by the reporter was attached, the appellant was entitled to a correction of the certificate in accordance with the original, although more than a year had elapsed since entry of the judgment.

**Same:** SUFFICIENCY OF RECORD. The evidence on the motion in this  
5 case to establish the original certificate attached by the official reporter is held to support a finding that the original certificate was detached by the reporter and inadvertently replaced by a defective one.

**Fraudulent conveyances:** CREDITORS' SUITS: RELIEF. It is not  
6 essary in a creditor's suit against nonresident defendants to set aside a conveyance that the claim be first reduced to judgment, but demand for judgment and to subject the land fraudulently conveyed may be made in the same action.

**Same: FRAUD: KNOWLEDGE OF GRANTOR'S INTENT: EFFECT.** Although  
7 a creditor may know that his grantor's conveyance to him was  
with intent to hinder and delay other creditors, still he may ac-  
quire good title if taken in good faith on his part and in satis-  
faction of a valid indebtedness due him.

**Same: HUSBAND AND WIFE: CONVEYANCE OF HOMESTEAD: CONSENT OF**  
8 **WIFE.** A wife is not bound to consent to a conveyance of the  
homestead, but as a condition precedent to her assent she may  
require that the transfer of property for which it is exchanged  
be made to her. And while transactions between husband and  
wife which have the effect of delaying creditors will be carefully  
scrutinized still she has the same rights as a vigilant creditor of  
her husband that others have, and if actuated only by a design  
to collect what is due her she is not subject to criticism.

**Same: TRANSACTIONS BETWEEN HUSBAND AND WIFE: REPAYMENT OF**  
9 **LOANS: REASONABLE TIME.** A husband may repay money bor-  
rowed in good faith from his wife, and where no definite time  
for repayment is agreed upon his obligation is to pay within a  
reasonable time. Evidence held to show that the transactions in  
question were not fraudulent as to the husband's creditors.

**Domestic animals: OWNERSHIP OF INCREASE.** In the absence of an  
10 agreement to the contrary the increase of domestic animals be-  
long to the owners of the dams.

*Appeal from Franklin District Court.*—HON. CHAS. E.  
ALBROOK, Judge.

MONDAY, NOVEMBER 20, 1911.

SUIT to subject certain land to the payment of the  
indebtedness of A. Eichmeier. The petition was dismissed.  
Plaintiff appeals. Affirmed on the merits, and order  
denying application to correct record *reversed*.

*Stipp & Perry* and *David Evans*, for appellant.

*John M. Hemingway* and *A. J. Daley*, for appellees.

LADD, J.—Shortly after the death of Herman Eich-

meier, the defendant, A. Eichmeier, a son, conveyed his one-eighth interest in four hundred acres of land, in Franklin county, left by deceased and subject to the life estate of the widow, if she take under the will, or, if she refuse, then to her dower therein, to Maud E. Daley. She immediately deeded the same to the defendant, Katie Eichmeier, wife of A. Eichmeier. At that time, the latter was largely indebted to the First National Bank of Wilmot, Minn., and to the Adrian State Bank of the same state; and in this suit it is sought to establish a portion of the indebtedness against the debtor, and subject the property conveyed to its payment. Several preliminary matters may be disposed of before considering the merits of the controversy.

I. The appellee filed an amendment to the abstract, asserting that the abstract did not completely and faithfully reproduce the record, denying that it contained all the evidence essential to a proper understanding of the case, and saying that appellee, Katie Eichmeier, "to correct the said errors amends said abstract to show the facts in accordance with the truth and the record in the following particulars." Here follow several corrections of the pleadings and amendments to the evidence of several witnesses as abstracted. It then denies that notice of appeal was ever served on defendant, A. Eichmeier, says that the abstract and amendment thereto do not contain all the evidence, and "especially states and shows that the testimony taken and offered during the trial of the case was never properly certified or properly made a matter of record, and denies that the evidence is preserved as by law required," and asserts that the certificate attached to the shorthand notes of the official reporter was never dated, entitled, or signed by him, and that the transcript of the evidence was not filed within six months after the entry of judgment.

Appellant moves that this amendment be stricken, because filed too late, and, subject to ruling thereon, that

the portion thereof denying the service of the notice of appeal and preservation of the evidence as of record be stricken. The delay in filing the amendment was due to no fault on the part of appellee, and as no prejudice resulted therefrom, it ought not to be stricken.

1. APPEAL: delay in filing abstract.

It appears that the notice of appeal was directed to both defendants, and service thereof was acknowledged by local counsel for Katie Eichmeier, as "attorney for defendants." Though A. Eichmeier did not answer, the judgment entry recited that "defendant, A. Eichmeier, having appeared at such hearing, both by counsel and in person," a personal judgment for \$4,527.20 was entered against him. As against the mere denial, unsupported by affidavit or otherwise, that counsel acknowledging service was attorney for A. Eichmeier, the record must be regarded as conclusive to the contrary, and the service regarded as sufficient.

2. SAME: service of notice: record evidence.

Nor do we think the circumstances that appellee filed an amendment to the abstract, "to show the facts according to the truth and the record," estop her from denying therein that the evidence was ever properly preserved as a part of the record. A party is not required to waive the contention that the evidence has been duly certified, in order to amend the abstract, or *vice versa*, but may both amend and deny, and, if the latter is unavailing, enjoy the advantage of having the omitted testimony before the court. True, something to the contrary was said in *Connors v. Railway*, 74 Iowa, 383, but taken back in *Hershey v. Nyenhuis*, 103 Iowa, 195. In *Sarvis v. Caster*, 116 Iowa, 707, the amendment to the abstract asserted that "the following amendments are a part of the record," and it was said that if a part of the record the evidence set out could only become such by timely certification. In *Doyle v. Duckworth*, 149 Iowa, 623, the decisions are reviewed, and therefrom it

3. SAME: amendment of abstract: waiver of defects in record.

plainly appears that in amending the abstract appellee does not waive objections to defects in the alleged preservation of the record, but may amend, subject to the ruling on a denial that the evidence has ever been filed or properly certified. The motion is overruled.

II. The transcript was not filed within six months after the entry of judgment, and appellee moves that the evidence be stricken from the abstract, for that the certificate attached to the report of the trial in shorthand, headed "In the district court in and for Story county," was neither entitled nor dated, and, though signed by the trial judge, was never signed by the official reporter. This appearing to be true, appellant moved that the certificates be amended by (1) inserting November 23, 1909, as the date thereof; (2) by adding to the reporter's certificate the name of the official reporter, who took the evidence down in shorthand; and (3) that said certificates be amended so as to conform to those attached to the transcript, and purporting to be copies of certificates to the shorthand notes. This was on the ground that the reporter, after preparing the transcript, had inadvertently substituted the certificates now attached thereto for those so attached at the time the notes were filed with the clerk of the district court. Subsequently the motion was amended, so as to pray that an order be entered, finding that the shorthand notes were duly certified when filed on November 23, 1909. The defendant, Katie Eichmeier, moved to dismiss the motion because filed more than a year after the entry of judgment, and otherwise resisted it. The cause was redocketed, and hearing had, at the conclusion of which the application to correct the record was denied. An appeal from the ruling was taken, and, aside from the contention that the application was not timely, presents an issue of fact only. As this is not a proceeding to correct any error or omission of the clerk, or irregularity in obtaining judgment, section 4093 of the

4. SAME: establishment of the record.

Code has no application. The amendment of a defective record is not sought, but the establishment of the record as it originally existed. This the court in a proper case may do at any time. 19 Am. & Eng. Ency. of Law (2d ed.), 556.

Were the shorthand notes properly certified when filed, November 23, 1909? No one, save the reporter, appears to have examined them before their return to the clerk of court after the preparation of the transcript. At that time, as previously stated, the printed certificate forms for Story county, without blanks filled, save the signature of the judge, were attached to said notes, but to the transcript thereof were attached what purported to be copies of the certificates, signed by trial judge and official reporter, bearing date November 23, 1909, with blanks filled and headed "In the district court in and for Franklin county," and a certificate of the reporter that these were exact copies of the certificates attached to the shorthand notes.

The reporter testified that, "After or during the time I made this transcript I looked to see whether the certificate was attached to the shorthand notes. There was a certificate attached. I made a copy thereof. I attached the copy to the certificate which I made here (referring to transcript). The copy is made on a blank attached to the transcript." He then explained that by "certificate" he meant those of the reporter and judge, printed on a single sheet of paper, and with blanks filled by typewriter, and proceeded: "I made the translation of these shorthand notes in Ames, at my home, in my room, which I call my den or office. I personally transcribed the shorthand notes. What I did in this particular case was as follows: I have a table somewhat larger than that (pointing), and lower, and during the summer time I prepare myself, as it were, for a sort of summer's campaign of work, and I take my shorthand notes and lay them face down in a box. I

usually use a typewriter paper box, and then I take out this brad here (indicating), and as fast as a sheet is completed I lay it in the box, or lay it back over the box, over the other way, and so on; and when the case is completed I put the notes together again. I reassemble the pages. Then I open my closet, where I have a shelf, and throw it up there and proceed with the next case. Each case takes its turn in that way. It is my recollection that in this case I separated the pages of the shorthand notes."

He testified further that he carried printed blank forms, headed "In the district court in and for Story county," in his grip with him to the several counties, and sometimes scratched out "Story" and inserted the name of the county where the action was being tried, and used these blanks; that the clerk of the district court of Franklin county kept printed certificates suitable for that county; that he had left the notes on the shelf, called for by defendant's counsel, and subsequently returned them to the clerk; that he had Story county blanks in his office at Ames, and also had had blanks signed by the trial judge; and continued: "I remember of making a copy of those—a copy of the certificate which is now attached to the transcript. That is my recollection of the matter. There was nothing in the certificate to the shorthand notes that struck me as being out of the way or unusual. It was my intention at that time to make a true copy of this certificate. I have searched everywhere, and have not found it."

On cross-examination, the witness testified that he was not basing his testimony on custom, rather than recollection; that several circumstances (naming them) had caused him to remember the case; that in filling out the blanks in the printed certificate forms he could have done so without referring to the certificates attached to the shorthand notes. "When I transcribed the shorthand notes, I unfastened them and took out the fasteners. As I transcribe each page, I put them front side down in a box which I

have for that purpose. I don't copy all of the outside cover page. It is the intention to lay this cover down in the box. That is the first paper I lay down. It is then my intention, after I have transcribed the first page, to lay them in the box with its face down, so that they will come in the same way as they were before they were separated. At the time that I come to the certificate which is attached, I don't transcribe that. I get a blank, which is similar in form, and fix it up like the one attached to the shorthand notes. I don't write it out. It is my intention to lay the certificate in the box the same as the rest of it after I get it done. I am certain that I did that in this case." He testified further that he had carried blank certificates, signed by the judge, to be filled out and attached to reports of trials as they occurred. "I would not say it was not possible for me, in my house, to attach them without signing them. I would not say anything is not possible. Q. Now, then, you are willing to concede that it was possible to attach the certificate without signing it? Mr. Perry: Objected to as being argumentative and asking for a conclusion of the witness. A. I am not, in its present form. I don't base my answer simply upon the fact of having attached this filled out blank to my transcript of the shorthand notes. The form itself disputes the proposition. That is why it is, and then my recollection of the matter. The form of the certificate as it appears there disputes the proposition, and according to my recollection. The printing is there all right; but that is all there is to it. I don't think it is very likely for me to have omitted my signature, or omitted to do anything to that form. Q. Would you not think it at all probable that you would attach a certificate to the shorthand notes, when you returned them to the clerk, such as you now find attached? A. I never saw this certificate at all. I must have put it there, or it would not have been there. I presume I must have put it there."

Redirect examination by E. D. Perry, Esq.: "This duplicate copy of the judge's and reporter's certificate to the shorthand notes was not made by me from memory. It was made by me with the other certificate before me. That is my recollection. I would not make one of those from memory. When the shorthand notes are filed, I always put a blank page on the back side to protect the certificate. That is why that is there."

Such is the evidence on which the order denying the application to correct the record was based.

It is evident that the certificates originally attached to the shorthand notes were detached therefrom by the reporter in getting ready to make the transcript. Did he replace them, or inadvertently attach those now fastened thereto, instead of those originally there? The latter conclusion seems to us the more reasonable, and as it is the more consistent with official probity, and sustained by the evidence, we think this should have been the finding of the district court. Otherwise the reporter must be held not only to have inadvertently or purposely omitted to fill out and sign the certificates attached to the shorthand notes, but negligently or intentionally to have falsely certified to the correctness of the copies attached to the transcript, and thereby have foisted a false record on the court. With printed blanks in his office, to which resort had been made for blanks on which to prepare the copies attached to the transcript, he might have inadvertently picked up one of these and fastened it to the shorthand notes, instead of the originals. Of course, there is no direct evidence of this, for had he known, the mistake would have been obviated. But circumstances proven in connection with the copies attached to the transcript warrant this inference, and we prefer to adopt this view, rather than another, inconsistent with official probity, and convicting an officer of the court, apparently worthy of confidence, of having negligently or intentionally made a false certificate, and thereby a spurious

record. It ought not to be assumed that this reporter is unworthy of confidence. His integrity is not questioned by counsel, and, though he may have been influenced in his account of the transaction somewhat by what had been his custom, he testified with apparent candor, and his evidence ought not to have been rejected. The order is reversed, and the record will be treated as corrected, so as to show the shorthand notes to have been duly certified.

III. The claims of plaintiff had not been reduced to judgment prior to beginning this suit. As defendants were nonresidents, this was unnecessary. Relief in the way of judgment against the debtor, and subjecting the land in the wife's name, was rightly sought in the same action. *Taylor v. Branscombe*, 74 Iowa, 534; *Com. Exchange Bank v. Applegate*, 91 Iowa, 411.

For the purpose of this case, it may be assumed that A. Eichmeier was insolvent when his interest in his father's estate was transferred to his wife. The evidence quite satisfactorily indicates that therein he acted with the design to hinder and delay, if not defraud, his creditors. No consideration passed upon the conveyance to Maud E. Daley, or from the latter to Katie Eichmeier; but it is contended that, even though the husband was actuated by an improper motive, his wife acquired the property in good faith, and for the sole purpose of satisfying a long-standing indebtedness owing her by her husband. Undoubtedly she was aware that he was largely indebted to the banks mentioned, but there is no direct evidence that she knew of her husband's design in causing the transfer of the property to her. But if she did know of his motive she had the right to collect her own claim and insist upon its satisfaction by the conveyance of the property, provided she did so in good faith, and not for the purpose of assisting him. *Muir v. Miller*, 103 Iowa, 127. According to her testimony, as well as

6. FRAUDULENT  
CONVEYANCES:  
creditors suits:  
relief.

7. SAME: fraud:  
knowledge of  
grantors in-  
tent: effect.

that of her husband, he had promised to convey his interest in his father's estate many years previous, in the event he did not sooner repay her for the money borrowed, and if such indebtedness was valid, the evidence was such that the trial court might have concluded that she acted in good faith. True, she knew that he had turned over to his father, shortly before, enough property to discharge \$12,000 of indebtedness to him, but there is no suggestion that this was not valid.

She had taken the deed of a house and lot in Adrian as their homestead in her name, but this was in lieu of a homestead interest in land conveyed, and for which the town property was received in part payment. If she refused to join in the deed conveying the land, unless the house and lot in Adrian were taken in her own name, she acted entirely within her right, as she was not bound to consent to the change, unless she chose to do so. *Garner v. Fry*, 104 Iowa, 515. The transaction furnished no cause of complaint by creditors. She had not mentioned the alleged indebtedness of her husband to her at any time when the cashier of the plaintiff or the cashier of the Adrian State Bank had importuned her to secure the husband's indebtedness to the banks by mortgaging the homestead, but, as she was not claiming the homestead as having been acquired in payment of what he owed, there was no occasion for doing so, and possibly, in view of subsequent events, it was the part of wisdom not to take them into her confidence. She had read a letter from plaintiff's cashier, threatening to attach, unless security were given, four days previous to the execution of the deeds, and if there was haste thereafter in procuring the satisfaction of her claim against her husband this was but an evidence of business sagacity. Undoubtedly the transactions between husband and wife, which have the effect of depriving his creditors of collecting their claims from his property, should be

8. SAME: husband and wife conveyance of homestead: consent of wife.

looked upon with suspicion and carefully scrutinized, but if it appears, in collecting her claim and receiving his property in satisfaction thereof, she has merely followed the tactics usually pursued by the vigilant creditor, actuated by the design only of collecting what is due her, she is not to be criticised therefor. If, then, her claim was valid, and substantially equal to the value of the property acquired, the finding of the trial court ought not to be disturbed.

Prior to her marriage with Eichmeier, when but nineteen years of age, she had exacted from him, then barely having attained majority, the execution of an antenuptial

9. SAME: transactions between husband and wife: repayment of loans: reasonable time.

contract in words following: "For value received I, August Eichmeier, hereby sell and transfer to Katie Phillips on condition that she marry me within (6) six months from this date, all the following described personal property, to wit: One top buggy now owned by me; one Deere riding corn plow; one Avery walking corn plow; one three-section Deere harrow; one Union corn planter and check-row attachment; one pair Ackley bobsleds; two sets double harness, white trimmed; one black horse, colt of spring of 1893, white star in face; one roan mare four years old, gray mare three years old; one dark-iron gray mare three years old; to have and to hold the aforesaid chattels forever on the condition before mentioned. Dated August 28, 1893. August Eichmeier." This is said to have been in the handwriting of Daniel Eiler, Esq., except that "one roan mare four years old, gray mare three years old," was inserted by her, with the consent of August, for that he had forgotten. By this instrument he promised to give all he had, save his share of a crop raised on a leased farm, and she took him at the price stipulated in October following. After consummating the bargain, she consented that he might use the machinery and stock with which to earn a livelihood. According to her testimony, she had \$45

when married, and received \$18.50 as a wedding gift. Shortly thereafter, he borrowed \$40 of this, on a promise to pay it back some time. Her mother and mother-in-law gave her poultry of several kinds, numbering twenty-two; and it was agreed that she was to have the money received for poultry and fruit sold from the farm. August borrowed some of this from her on the same promise. They had the same agreement concerning money received by her from boarding the school teacher and others, and he obtained part of this in the same way. The mares enumerated in the antenuptial contract raised eleven colts, and these, together with the mares, were disposed of by August with the promise to repay his wife. Though no accounts were kept or notes given, she testified to the several items, said to have been borrowed by him to use in his business, specifically, and that he had promised to pay the same, with interest thereon. That no definite time of repayment was fixed did not impair his obligation to repay within a reasonable time. *Mahaska v. Whitsel*, 133 Iowa, 335; *Sprague v. Benson*, 101 Iowa, 678.

It will be observed that August did not collect the money for board or chickens sold, and the like, and after using it for the family, promise to repay. See *Hanson v. Manley*, 72 Iowa, 48; *Hamil v. Henry*, 69 Iowa, 752. His wife collected the money, under the express understanding that it was to belong to her, and thereafter made a loan to him upon his promise some time to return it. He had the right to give her the money, if he chose, not being then indebted; and if he thereafter borrowed it of her we see no reason why he should not repay the same, as though promised by anyone else. This was the holding in *Daggett v. Bulfer*, 82 Iowa, 101, where the husband had paid the wife for services rendered. It must be conceded, however, that there is some ground to distrust somewhat the testimony concerning the items mentioned, other than the proceeds of the mares and colts. All the moneys received were

acquired in connection with his property and in the management of the family affairs. They had three children and the story that she, instead of using the moneys in meeting family expenses, or allowing him to have the same for that purpose, loaned it to him to be used in his business is one which might very easily be manufactured.

But the antenuptial contract and her subsequent marriage gave her full ownership of the three mares enumerated therein, and the rule is well settled that, in the ab-

10. DOMESTIC ANIMALS: ownership of increase.

sence of any stipulations to the contrary, the offspring of domestic animals belong to the owner of the dams. *White v. Storms*,

21 Mo. App. 288; *Hazel Baker v. Goodfellow*, 64 Ill. 238; *Leavitt v. Jones*, 54 Vt. 423 (41 Am. Rep. 849). See *Rogers v. Highland*, 69 Iowa, 504; *Demers v. Graham*, 36 Mont. 402 (93 Pac. 268, 14 L. R. A. (N. S.) 431, 122 Am. St. Rep. 384); *Maize v. Bowman*, 93 Ky. 205 (19 S. W. 589, 17 L. R. A. 81). It affirmatively appears that Mrs. Eichmeier had in no way parted with the right to the increase, and she was entitled to the proceeds, not only of the mares, but of the colts raised, when sold. The indebtedness therefore is not disputed. Further it appears that after she acquired the house and lot in town she permitted him to remove the barn therefrom, for the purpose of transforming it into a livery stable, that he did so under the express agreement to pay her therefor, that she expended about \$400 in the repair thereof, and that he promised to pay her \$1,400 for it. It may be that the price fixed was excessive. Possibly she was driving a hard bargain again; but the testimony concerning the transaction is not controverted in any way.

While some of the items recounted may be of doubtful propriety, there is enough, beyond question, with interest computed thereon, to considerably exceed the value of the estate conveyed, and this accounts for the settlement without accurately determining the amount of the husband's in-

debtedness to her. The record is such as to preclude interference with the finding of the trial court that the conveyances were not fraudulent.

On appeal from an order denying the application to correct the record, *reversed*. On the merits, *affirmed*.

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DAHMS & SONS COMPANY v. GERMAN FIRE INSURANCE Co., Appellant.

**Insurance: AVERAGE CLAUSE: STATUTES.** A clause attached to a  
1 single insurance policy covering several buildings, providing that in case of loss the policy shall attach to each building in proportion to the value which it bears to the aggregate value of the entire property, is not in violation of the statutes relating to insurance; and without it there would be an increase of risk without a corresponding increase in premium.

**Same: CONSTRUCTION OF POLICY.** While a policy of insurance should  
2 be construed in the sense in which the insured had reason to understand it, still like other contracts force and effect must be given the language used, unless by some ambiguity or craft they are calculated to mislead the insured.

**Same: AVERAGE CLAUSE: VALIDITY: STATUTE.** An average clause is  
3 not directly nor impliedly prohibited by the statute prescribing a standard form of policy, but may be termed a specification of the property insured; and the statute authorizes the company to attach forms or slips of description, location and specification of the property.

*Appeal from Woodbury District Court.*—HON. FRANK R. GAYNOR, Judge.

MONDAY, NOVEMBER 20, 1911.

ACTION on a policy of fire insurance. On an agreed statement of facts the court rendered judgment for plaintiff, and defendant appeals.—*Reversed*.

*Thomas Bates and Henderson & Fribourg*, for appellant.

*Ferris & Iddings*, for appellee.

McCLAIN, J.—The plaintiff, being the owner of five separate buildings situated on a parcel of ground in Sioux City, the buildings being of the aggregate value of \$85,000, secured various policies of fire insurance covering all five buildings in the aggregate sum of \$10,000. All the policies were of the standard Iowa form, and to each of them, with one exception, was attached, by way of rider, what is called the average clause. One of these policies being for \$1,500, to which such rider was attached, was a policy issued by the defendant. Within the terms of insurance covered by all these policies, plaintiff suffered a loss by fire in respect to one of the buildings, which was adjusted by the agents of all the companies in the sum of \$1,448.19. In this adjustment it was insisted for the defendant and the other companies whose policies contained the average clause that the liability of such companies was by reason of such clause limited to that proportion of the insurance which the value of the building destroyed bore to the aggregate value of all the five buildings insured, and that the liability of the defendant as one of the coinsurers was \$25.56; whereas the plaintiff contended that the average clause was invalid, that each of the companies was liable for its *pro rata* portion of the loss, and that the liability of the defendant was therefore \$217.23. By an amicable arrangement between plaintiff and defendant, this action is brought to recover the difference between these two sums, that is, \$191.66; the object of the suit being to determine the validity of the average clause, and secure a basis on which all the claims under the policies containing the average clause may be settled.

The sole ground for insisting upon the invalidity of the average clause is that it is contrary to the provisions of our fire insurance statute, as found in the Code and Code Supplement, as follows:

Sec. 1746. Any provision, contract or stipulation contained in any policy of insurance issued by any insurance company doing business in the state, under the provisions of this chapter, providing or stipulating that the insured shall maintain insurance on any property covered by such policy to any extent, or shall to any extent be an insurer of the property insured in such policy, or shall bear any portion of loss on the property insured, shall be void. . . .

Sec. 1758-a. It shall be unlawful for any insurance company to issue any policy of fire insurance upon any property in this state other or different from the standard form fire insurance policy herein set forth, except . . .

2. It may use in or upon its policy forms or slips of description, location and specifications of the property insured, together with permits upon such conditions not in conflict with the provisions of law, as may be agreed upon, for the use or storage of electricity, gasoline, explosives, or other extra-hazardous products or materials; for repairs or improvements; for the operation or ceasing to operate, and for the vacancy of the premises, and permits for hazards other than those specifically mentioned above, also a mortgagee's or loss payable clause, and other permits or riders not in conflict with law.

The average clause attached as a rider to defendant's policy is in the following language: "It is hereby agreed that in case of loss this policy shall attach in each building in such proportion as the value of each building bears to the aggregate value of the entire property insured."

The statutory provisions above quoted prohibit (1) any stipulation "that the insured shall maintain insurance on any property covered by such policy to any extent, or shall to any extent be an insurer of the property insured in such policy, or shall bear any portion of the loss on the property insured;" and (2) any modification of the standard form of policy prescribed by statute (which form does not include an average clause), save that it may attach thereto "forms or slips of description, location and specifications of the property insured" and permits for certain

purposes, "and other permits or riders not in conflict with law."

The question submitted to us for determination is whether the average clause is prohibited under Code, section 1746, or permitted under Code Supplement, section 1758-a, as above quoted. The statutory provisions as to prorating are not here considered, for the reason that there is no controversy in regard to the prorating between the companies, and no question as to the right of each to limit its liability to the *pro rata* share of the total insurance covering the loss. This matter was determined in the adjustment, which is not questioned, save in so far as it was based on the average clause.

I. The provision above quoted, found in Code, section 1746, was apparently intended to prohibit any stipulation for co-insurance, such as fire insurance companies sometimes insert in their policies. See Rich-

1. **INSURANCE:**  
average clause: statutes. ards, Insurance Law (3d ed.), section 242.

Similar statutes are found in other states, and under them any stipulation for co-insurance is invalid. *Attorney-General v. Commissioner of Insurance*, 148 Mich. 566 (112 N. W. 132). Where there is no such statutory prohibition, various forms of co-insurance clauses have been in use. See Richards, Insurance Law (3d ed.), 727n-729. It is evident, however, that the statute is more specifically directed against a stipulation requiring the insured to maintain insurance on the property up to a stipulated percentage of its value; the effect of such a stipulation being that in case of partial loss the owner can have only a partial recovery, although the total amount of his insurance exceeds the total amount of the loss. See the opinion in *Attorney-General v. Commissioner of Insurance*, *supra*, in which the nature of such a clause is fully discussed. The statute was evidently not intended to prohibit an arrangement by which the insured should carry a part of the risk. If he maintains insurance up to the required percentage,

he still, in the case of total loss, carries the risk in excess of the percentage specified; but in case of a partial loss he gets full indemnity, if the total amount of the insurance exceeds the amount of the loss; whereas, under a co-insurance clause requiring him to maintain insurance up to the specified percentage, he does not secure full indemnity for such partial loss unless he has the full amount of the insurance required.

The average clause is used for a wholly different purpose. It is primarily intended to apply to manufactories or storehouses, the contents of which are covered by a blanket policy; the contents being insured in whichever one or more of the various factories or storehouses described it may be located at the time of the loss; the particular amount of such contents in any particular building not being determinable at the time the policy is issued, but only ascertainable after the loss. 1 Biddle, Insurance, section 2; Richards, Insurance Law (3d ed.), 727; Clement, Fire Ins. 511. But, even as applied to several buildings covered by a blanket policy, it does not operate as a stipulation for co-insurance.

We think that an illustration will make plain the distinction above made, and an illustration of the effect of a single policy on several buildings with an average clause attached will be entirely applicable to the present case, for all the policies were treated in this adjustment as constituting an aggregate amount of insurance. Suppose, therefore, that the plaintiff, desiring to secure insurance on his five buildings of different values and of the aggregate value of \$85,000, has taken one policy in the defendant company for \$10,000. Without an average clause attached, he would be entitled to indemnity to the extent of \$10,000 for a partial loss on any one of such five buildings; that is to say, under such a policy, without an increase of premium, the company would have incurred five times the risk of loss which it would have incurred under specific

policies in proportional amounts on each of the five buildings; the same rate of premium being paid. The company could only avoid this increase of risk without increase of premium by attaching an average clause, the simple effect of which would be that as to each building its risk should be in the proportion which the value of the specific building bore to the total value of all the buildings. If this proportion had been determined beforehand, there would certainly have been no invalidity in the stipulation. It is usual to apportion the risk in one policy covering two or more buildings on the same premises, so as to limit the liability to a stipulated amount as to each building. For instance, under a policy for \$3,000 on a house and barn on the same premises, it is usual to stipulate that a certain amount, say \$2,500, shall be applied to the house, and \$500 to the barn; and in case of even a partial loss to the barn in excess of \$500 the insured will be limited to that amount of indemnity, although he is in fact carrying \$3,000 on the entire property. A rider to that effect is clearly contemplated by the portion of Code Supplement, section 1758-a, above quoted. A blanket policy on several buildings with an average clause attached differs from a blanket policy on several buildings with a specification of the indemnity provided as to each building only in this respect: The indemnity provided as to each building, instead of being fixed at a stipulated amount, is made to depend upon the proportionate value which each particular building bears to the total value of the buildings; that amount to be ascertained after the loss, instead of determined at the time the policy is issued. In this there is nothing unreasonable, for the values may fluctuate during the term of the policy by reason of deteriorations or improvements. The insured has specific insurance on each building to that proportion of the value of that building which its value bears to the value of all the buildings covered. In the event of a partial loss on any one building, he gets full

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indemnity, provided the insurance appropriated to that building is sufficient to cover the loss; and there is therefore no question of co-insurance.

The argument for plaintiff seems to be that by the general nature and terms of the policy it was misled into thinking that it was securing indemnity for loss as to any one of its five buildings to the extent of \$10,000 as effectually as though it had taken a policy for \$10,000 on that building alone. But, in the absence of any allegation of fraud, concealment, or misrepresentation, we would not be justified in assuming that it could reasonably have so understood the contract. This is not a case where, as counsel contend (quoting language found in *Matthes v. Imperial Acc. Ass'n*, 110 Iowa, 222), "the return offered bears such an insignificant ratio to what was paid for that the suggestion of such a settlement (as was proposed) seems a grim jest." The plaintiff got just what it paid for. It could not have supposed that the company was willing to give it insurance on five separate risks at the same rate that it would pay for a like amount of insurance on one risk. Suppose, for instance, that the owner of five farmhouses on as many different farms, and therefore not exposed in any way to the peril of destruction by the same fire, each of the farmhouses being worth \$2,500, should desire to insure each of them against loss to the extent of \$2,000, would he be justified in assuming that he could get a blanket policy of insurance on all five houses, which would afford him the same protection against partial or total loss, on the usual terms on which a policy for that amount would be issued covering one house? And if he found in his blanket policy an average clause, would not he be fairly required to understand that he had in fact insurance on each house only to the extent of \$400?

It is true that, as counsel argue, a policy of insurance is to be construed in favor of the insured in the sense in which he had reason to understand it; but policies of in-

insurance, like other contracts, must be so construed as to give force and effect to the language used, unless by reason of some ambiguity or craft they are calculated to mislead the insured. "While we are authorized to construe the policy, we are not at liberty to strike out absolutely a carefully inserted and detailed provision thereof." *Insurance Company v. Ayers*, 88 Tenn. 728 (13 S. W. 1090). In the case just cited, it was held that where a policy for \$1,000 was placed upon an aggregate valuation of \$3,510, distributed over ten separate and distinct parcels of property of varying estimated values, and the policy provided that it should cover *pro rata* on each of the items, the measure of the company's liability for loss as to one of the items must be determined upon the basis of the relation of the value of that item to the aggregate value of the property, so that for a total loss of that item there could not be a recovery of more than its proportional value of the total insurance. The case seems very analogous to the one before us. Further to the effect that where there is no ambiguity or irregularity in the provisions of the policy the liability of the company should be determined by its plain terms, see *Nelson v. Traders' Ins. Co.*, 181 N. Y. 472 (74 N. E. 421).

The average clause is not a new device resorted to by insurance companies to avoid the provisions of our statutes. While there are meager references to it in the text-books, and, so far as we can find, no cases specifically relating to its application, it was fully described prior to the enactment of our statute in Biddle on Insurance, a standard text-book to which we have already referred. See, also, Bunyon, *Fire Ins.* 3, 102, 119; Ellis, *Insurance* (2d ed.), 55. So far as we can discover, it is as old as the co-insurance clause; and if the Legislature had intended to prohibit its use in the section of the Code first above cited (embodying a statute passed in 1894) some unambiguous reference to it would surely have been made.

II. If the average clause is not prohibited by Code, section 1746, then there is nothing in Code Supplement, section 1758-a-d, which prescribes a standard fire insurance policy for Iowa, forbidding its addition

3. SAME: average clause: validity: statute.

by rider to the standard form; for it is not only provided in the portion of that statute above quoted that the company may attach "forms or slips of the description, location and specifications of the property insured," but also that it may attach "other permits or riders not in conflict with law." The average clause is not specifically prohibited by law, and certainly if it may be included under the term "specifications of the property insured," then it is not prohibited by implication. As already suggested, such a clause amounts to a specification that, as to each of the separate items of property insured, the risk shall be a proportionate share of the total risk, determinable by the ratio which the value of that item bears to the entire value of the property insured. Neither the language nor the policy of the statute, therefore, is inconsistent with the addition of the average clause by rider to a blanket policy, framed in the terms required by the Iowa statute. Under a New York statute providing for a standard policy of insurance, the Court of Appeals of New York has said: "It is quite competent, in so far as the provisions of a policy are concerned, to modify, or to restrict them, or to describe more particularly the actual risk assumed, by a written indorsement upon the instrument. The Legislature left the parties free in that respect." And it was said, as to a particular written indorsement made on the standard form: "This clause of the contract is plain; it is not unreasonable as a limitation of the insurance hazard, and, unless the court is to make a new contract between the parties, it should be enforced." *Nelson v. Traders' Ins. Co., supra*. In this case we reach the conclusion that the average clause added by way of rider is not in violation of any statutory provision, and is not

unreasonable as applied to the subject matter. It should therefore be given its intended effect.

The trial court erred in holding the average clause to be void as prohibited by statute, and should have rendered judgment in defendant's favor. The cause is remanded for judgment in accordance with the views expressed in this opinion.—*Reversed*.

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WILLIAM SCHIMMELPFENNING, Appellee, v. BARNEY B.  
BRUNK, Appellant.

**Conveyances:** INCUMBRANCE: NOTICE: REFORMATION: EVIDENCE. The

1 record of a contract creating a lien upon property is sufficient to charge a purchaser with notice of the obligee's rights, and to render it effective as to him against the purchaser, but is of slight significance on the question of whether there was a failure to except it from the covenants of the grantor's deed through mutual mistake; although actual notice to the grantee of the existence of the incumbrance would be important, as sustaining the grantor's contention that the purchaser was to assume the same and that through mutual mistake the deed failed to so state.

**Same:** BREACH OF INCUMBRANCE: MEASURE OF DAMAGES. Where the

2 incumbrances consisted of a contract to furnish power for a specified time upon monthly payments at less than the cost of producing the power, upon performance by the grantee he should recover of the grantor either the monthly loss as it accrued, or he should be charged with a lump sum equal to the total present worth of each monthly installment.

**Same:** AMOUNT OF RECOVERY. Recovery for breach of covenant in

3 a deed can not exceed the amount of consideration paid therefor, with interest.

**Same.** For the purpose of determining the amount of recovery for

4 breach of covenant in a deed the true consideration therefor may be inquired into by parol.

*Appeal from Davis District Court.*—HON. D. M. ANDERSON, Judge.

MONDAY, NOVEMBER 20, 1911.

VOL. 153 1A.—12.

ACTION for breach of covenant of a deed against incumbrances. Defendant filed a cross-bill asking reformation of the deed so as to except the alleged incumbrances from the covenant. Reformation of the deed was denied, and a decree entered for the plaintiff. Defendant appeals. —*Modified and affirmed.*

*John F. Scarborough and E. Rominger, for appellant.*

*Payne & Goodson, for appellee.*

EVANS, J.—Separate actions were brought by the parties against each other, and these were consolidated. Their controversy is now presented to us in a suit in equity, wherein the plaintiff claims damages for breach of covenant in a deed of conveyance, and wherein the defendant by cross-bill asks a reformation of the deed and other relief. The trial court denied the reformation, and awarded damages to the plaintiff as for breach of covenant against incumbrances. We will give our first consideration to the defendant's cross-bill.

I. Prior to January '11, 1909, the defendant was the owner of certain real property located in the town of Pulaski, Iowa, referred to in the record as the "Mill Property." This property included a sawmill, a gristmill, and a blacksmith shop. The plaintiff was the owner of one hundred and eight acres of rough land in Davis county. On the date mentioned the parties exchanged properties, and each executed to the other a deed of conveyance. Each property was conveyed by a warranty deed subject to certain specified incumbrances. The plaintiff accepted from the defendant a conveyance of the mill property subject to a mortgage of \$200. The land conveyed by the plaintiff to the defendant was incumbered by mortgage and taxes to the amount of \$1,482. Of such incumbrance the defendant assumed \$1,310 and accepted from the plaintiff a con-

veyance subject to the mortgage to that extent. Up to this point there is no controversy as to facts. It further appears that there was another incumbrance upon the mill property of which no mention was made in the deed. Such incumbrance consisted of a certain contract entered into by one Stevig, a former owner of the mill property, and a grantor of the defendant, Brunk. This contract was entered into by Stevig with the "Pulaski Light & Power Co.," and by its terms bound Stevig, for a stated price per month, to furnish power to the Light & Power Company for the operation of its electric plant for a period of ten years. The contract also provided that the Light & Power Company should have a lien upon the property in question for the performance of the contract by Stevig. In pursuance of the contract, certain electric appliances, including dynamos, were installed in the mill, and were in operation at the time of the trade. After taking possession of the mill property, the plaintiff continued to furnish the power to the company, as his grantor had done, but discovered that such power could not be furnished at the contract price, without substantial monthly loss. This is the nature of the incumbrance of which he complains.

It is the contention of the defendant by his cross-bill that at the time of the negotiations leading up to the trade the plaintiff knew of the contract and the terms thereof, and that it was mutually understood that he was to assume its obligations, and that such contract was to have been excepted from the defendant's covenant against incumbrances, but that it was omitted through mutual inadvertence and mistake. The defendant asks, further, that the deed be reformed so as to except such contract from the covenant. The plaintiff denies that there was any mistake or oversight in the deed, and denies that he ever knew that there was any other incumbrance upon the property except as stated in the deed. As a witness, the plaintiff admits that he knew or supposed that his grantor had a contract

with the Light & Power Company to furnish power, but he denies that he knew that such contract was in any sense an incumbrance upon the property, or that it bound him to an unprofitable performance. This is the real point of controversy of fact between the parties. If the plaintiff had seen the contract, or if he knew that it did constitute an incumbrance upon the property, it would be a strong, if not a controlling, circumstance in connecting with the other evidence in the case, in support of the defendant's contention. The court found against the defendant on this issue. We have read the evidence carefully, and we reach the same conclusion. There is no claim that the contract was exhibited to the plaintiff. He did know or believe that the Light & Power Company would be his patron to the extent already indicated. This fact was put before him as an asset, and not as a liability. He did not know that the contract constituted an incumbrance. He did not in terms bind himself to the performance of the existing contract. So far as appears in this record, he is not personally liable for the performance of the contract.

It is argued that the contract in question was on record, and that the plaintiff was charged with constructive notice, and that, in any event, with ordinary diligence, he could have ascertained its contents. Grant-  
 1. CONVEYANCES:  
   incumbrance:  
   notice: refor-  
   mation: evi-  
   dence.  
 ed that the plaintiff was charged with constructive notice of the contract, such fact is of no avail to the defendant. Such constructive notice operated against the plaintiff, in favor only of the beneficiary of such a contract. It is because he was charged with constructive notice that the incumbrance is effective against him. And it is because the incumbrance is effective against him that he is entitled to recovery upon the covenant.

If the plaintiff had had actual notice of the incumbrance, such fact would be important as a circumstance in the defendant's favor, tending to sustain his contention that

the plaintiff was to assume the incumbrance. Constructive notice, as a circumstance, could have little, if any, significance in the direction indicated. We think the trial court properly denied reformation of the deed.

II. The next question presented for our consideration is: What is the true measure of the plaintiff's damages? The contract will not expire until June 29, 1917. Con-

1. SAME: breach  
of incum-  
brance: meas-  
ure of dam-  
ages.

siderable evidence was introduced by both parties as to the monthly cost of performing the contract. The trial court found that the performance of the contract will entail a monthly loss of \$19.50. This finding is complained of by the appellant. Under the evidence, we think it is conservative, and entirely fair to the appellant. The trial court properly found, also, that the contract would have one hundred and two months to run from January 11, 1909, the date of the conveyance, and that the total damages which would accrue to the plaintiff in the course of eight and one-half years would amount to \$1,989. But the court awarded to the plaintiff the full sum of \$1,989, with interest thereon at six percent from January 11, 1909. Inasmuch as the plaintiff's loss as so estimated would only accrue in monthly installments of \$19.50 for a period of eight and one-half years, it is manifest that the judgment in this form rendered to the plaintiff greater compensation than his loss. It was suggested by the trial court that the interest on the sum total would not more than cover the wear and tear of machinery, but the suggestion was quite beyond the evidence. The defendant should have been permitted either to pay the monthly installments of loss as they accrued, or else he should be charged with a lump sum equal to the sum total of the present worth of each monthly installment. Such present worth should be computed at six percent, and should be determined as of January 11, 1909. The sum total thus found should bear interest from January 11, 1909. This course would render

the rule of measure of damages consistent and just. We can not take the time to make a computation of the present worth, but will leave that labor to be performed by the parties themselves before final decree. To this extent, at least, the decree should be modified. The sum total should be further subject to the limitations stated in the next paragraph hereof.

III. It is urged by the appellant that the amount allowed by the trial court exceeded the full consideration paid by the plaintiff for the property, and that such amount was therefore excessive on that ground alone. It is the rule in this state that the recovery for breach of covenant in a deed can not exceed the amount of consideration paid, with interest. Such was the holding of this court in an early day. *Swafford v. Whipple*, 3 G. Greene, 263; *Richards v. Iowa Homestead*, 44 Iowa, 306; *Norman v. Winch*, 65 Iowa, 263. We think that the rule of measure of damages which we have above considered in the preceding paragraph must be made subject to the limitations of the rule here stated, viz., that the sum total can not exceed the consideration paid with interest thereon.

IV. In view of what is stated in the foregoing, it becomes necessary to determine what was the consideration paid for the property. The consideration expressed in each deed was \$5,400. It is conceded, however, that this sum was not the true consideration, and that neither property was worth such price. In such cases it is permissible to ascertain the true consideration by resort to parol evidence. *Swafford v. Whipple, supra*. Five witnesses were examined on each side as to the value of the land conveyed by plaintiff to defendant. Without any doubt, the land was of very poor quality and of comparatively little value. Four witnesses on behalf of the plaintiff fixed its value at \$30 per acre. The witnesses for the defendant fixed it at from \$20 to \$22 per acre.

In the light of the evidence descriptive of the character and quality of the land, we are satisfied that its value was not in excess of \$25 or \$26 per acre. Adopting the maximum figure of \$26 per acre, the full value of such land would be \$2,808. From this amount should be deducted the incumbrance thereon. As near as we can ascertain from this record, such incumbrance amounted to \$1,472. This would leave a margin of \$1,336 as the true consideration paid by the plaintiff to the defendant for the mill property. The measure of the plaintiff's damages must, therefore, be computed as indicated in paragraph 2 hereof, but not exceeding the amount of consideration paid.

To this extent the decree entered below must be modified. In all other respects it is affirmed. The case may be remanded for a final decree upon the basis here indicated, or either party may present a computation and move for a decree in this court.—*Modified and affirmed.*

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A. J. BURGE, Appellee, v. PHILLIP GOUGH and ANNA  
GOUGH, Appellants.

**Real property:** SPECIFIC PERFORMANCE: MUTUALITY OF CONTRACT. An  
1 executed contract for the sale and purchase of real estate, by  
which one party agrees to sell and the other to buy at a stipu-  
lated price and terms of payment, is not lacking in mutuality and  
may be specifically enforced.

**Same:** UNCONSCIONABLE CONTRACT. The mere fact that after the  
2 execution of a contract for the sale of land there was a material  
increase in its value does not render the contract unconscionable  
so as to prevent specific performance; especially where the price  
agreed upon was fair at the time of making the contract.

**Same.** While courts of equity sometimes refuse specific perform-  
3 ance of valid contracts, leaving the complainant to his legal  
remedy, in this action nothing is shown justifying a refusal of  
the relief asked.

*Appeal from Johnson District Court.*—HON. R. P.  
HOWELL, Judge.

MONDAY, NOVEMBER 20, 1911.

ACTION for specific performance of a contract to convey real estate. There was a decree for the plaintiff, and defendants appeal.—*Affirmed.*

*Wade, Dutcher & Davis*, for appellants.

*Ranck & Bradley* and *S. K. Stevenson*, for appellee.

EVANS, J.—The defendants are husband and wife. In August, 1908, they entered into a contract with the plaintiff as follows:

This is to certify to an agreement entered into this 31st day of August, 1908, between Phillip Gough and Anna Gough, his wife, and Dr. A. J. Burge, whereby they, Phillip Gough and Anna Gough, agree to sell to Dr. A. J. Burge their farm of one hundred and fifty-two acres (152), plus acres lying in section thirty-one (31), township eighty (80), range six (6), being the west half of the northwest one-fourth, and the north half of the southwest one-fourth, and a lane twenty-two feet wide leading south to the Marengo road, for the sum of eleven thousand (\$11,000.00) dollars. Ten (\$10.00) dollars of which is already received and one hundred and ninety (\$190.00) dollars more to be paid on the delivery of a good and sufficient abstract of title by Gough to Burge. The balance to be paid on delivery of possession and deed, March 1, 1910, and to pay all taxes until they give possession. Mr. and Mrs. Gough hereby agree to keep the land and improvements as it now is, natural wear and tear excepted, and they are not to plow more than forty acres grass land and are to seed to timothy and clover the forty acres now in corn, in the spring of 1909. Dr. Burge is to have the privilege of setting out trees around the edge of the farm if desired and to tile drain during the season of

1908 and 1909 if he should desire. Signed this 31st day of August, 1908. Phillip Gough. Anna Gough. Dr. A. J. Burge.

The plaintiff made a good and sufficient tender on March 1, 1910. The defendants refused to convey.

The principal point argued here by appellants is that the contract by its terms was lacking in mutuality, in that it contained no express agreement to purchase, or promise to pay by the plaintiff. We are united in the opinion that the contract will not fairly bear such an interpretation. It purports to be an "agreement" between the plaintiff on one part, and the defendants on the other. The terms of the agreement are set forth therein. It was duly signed by the plaintiff, as well as by the defendants. It can not be said that the contract was a mere option to the plaintiff. It was as binding upon him as it was upon the defendants. The appellants cite authority as to the proposition that specific performance will not be awarded in favor of a party who was not himself bound by the contract. We can not deem their authorities applicable to the case before us. The contract herein involved is not unilateral, as contended by appellants.

1. REAL PROPERTY: specific performance: mutuality of contract.

It is also urged in argument that the contract was inequitable and unconscionable. If this contention were sustained by proof, we should not overlook it. We find

nothing in the record to sustain this contention. It does not appear from the evidence that the price agreed upon was less than the value of the farm. On the contrary, it does appear on the cross-examination of one of the defendants' witnesses that it was "well sold at the time." The evidence does show that there has been an increase in the value of lands in that vicinity since the date of the contract. It is urged that the effect of this contract was to secure the plaintiff the advance in the value of the property between

2. SAME: unconscionable contract.

the date of the contract and date when it was to be performed, and that this advantage was acquired by the plaintiff by the mere payment of \$10. The subject of future appreciation or depreciation is worthy of a seller's consideration before he enters into a contract of sale. It is not claimed herein that the subject did not receive consideration by the defendants before they entered into their contract. It is simply shown that the land did, in fact, advance in value in the meantime to the extent of \$10 or \$12 per acre. The point is without merit. The necessary effect of an executory contract to convey real estate is to give the purchaser the benefit of future appreciation. He must carry the risk also of future depreciation.

In January, 1909, the defendants brought an action against the plaintiff in the district court of Johnson county, setting up the contract now before us, and asking for a cancellation of the same on various grounds.

3. SAME.

Upon a trial had, the petition was dismissed. The proceedings and judgment in that case have been pleaded by the plaintiff as an adjudication and as a bar to any defense in the present action. Much of the argument of counsel has been devoted to that question. We find it sufficient to say that that adjudication was not necessarily decisive of this case. Granting the plaintiff's contention that it adjudicated the validity of the contract, it would not necessarily follow that the plaintiff would be entitled to specific performance. Courts of equity often refuse specific performance of valid contracts, while leaving to the complainant his right to his legal remedy for damages for breach. In the case before us, however, we see no evidence of any fact which would justify us in refusing specific performance. The decree of the trial court must therefore be, and it is, *affirmed*.

**EMIL SCHURZ, Appellant, v. W. H. SCHURZ, LOLITA S. MOLLRING and HENRY MOLLRING, Appellees.**

**Trusts: HOW CREATED: PAROL EVIDENCE.** Declarations of trust are  
1 required by the statute to be in writing and can not therefore be ingrafted by parol on a deed reciting a fair consideration for the property and containing no provision attaching any trust to the title.

**Conveyances: DELIVERY OF DEED: PRESUMPTION: BURDEN OF PROOF.**  
2 Where the grantee in a deed is in possession of the same and of the property conveyed thereby it will be presumed that the deed was delivered, and the burden of establishing nondelivery is upon the party alleging it.

**Same: EVIDENCE.** Delivery of a deed is so largely a question of  
3 intent of the parties that no particular course of conduct can be said as a matter of law to be necessary to its accomplishment, but where the grantor or one acting for him passes the deed with intent to transfer title to the property, there is a valid delivery; and it is generally held, especially as between parent and child, that the placing of a properly executed conveyance in the hands of a third person, to be delivered to the grantee upon the death of the grantor, is a valid delivery. In this case the evidence is held to justify a finding of an effective delivery.

**Trusts: HOW CREATED: EVIDENCE.** A trust can not be orally ingrafted  
4 upon a deed which is an absolute and unconditional conveyance of the fee; and even though an oral declaration of trust may be enforced against the party sought to be charged, where he has once recognized its obligation and undertaken its performance, still the evidence of such recognition and performance must be unequivocal. The evidence in this case is insufficient to charge the grantee with a trust resulting from recognition.

*Appeal from Pottawattamie District Court.*—HON. A. B. THORNELL, Judge.

THURSDAY, DECEMBER 15, 1910.

ACTION in equity to vacate and declare void a deed of conveyance and to establish plaintiff's title to an interest

in real estate and for partition. Decree dismissing the bill, and plaintiff appeals.—*Affirmed.*

*A. W. Askwith*, for appellant.

*Harl & Tinley* and *W. E. Mitchell*, for appellees.

WEAVER, J.—Mrs. E. E. Schurz, widow, resided in Council Bluffs, and was the owner of the real property which is the subject of this litigation. She had three children, the plaintiff, Emil Schurz, and the defendants, W. H. Schurz and Lolita S. Mollring. Mrs. Schurz died September 12, 1908, and very soon thereafter a deed was placed of record purporting to have been made by her in her lifetime conveying the real estate to her daughter, Mrs. Mollring. Thereafter plaintiff began this action in equity alleging himself to be the owner of a one-third interest in the property and asked to have the same partitioned. To this action Mrs. Mollring and W. H. Schurz appeared and answered denying the averments of the petition, and the former by her separate cross-petition asserted ownership of the property in her own right and prayed that her title be quieted accordingly. Replying to the cross-petition, plaintiff denies that the deed purporting to have been made by Mrs. Schurz to her daughter was ever delivered in the lifetime of the grantor, and therefore never became effective as a conveyance. He further alleges that at the time of the death of the mother and prior thereto she and her children labored and acted under a mistaken understanding and belief that a deed made by her, though not delivered, would operate at her decease to vest the title in the daughter in trust for the use of all the children, that the deed in question was in fact made and executed with that intent and for that purpose, and that, still, actuated by that mistaken belief he (plaintiff), after his mother's death, consented to the recording of the deed and to the

assumption of control of the property by his sister. He also avers that for a considerable period and on divers occasions his sister recognized and conceded the trust character of the title held by her, but has since disclosed a purpose to assert a title in herself and to unite with his brother, W. H. Schurz, in defrauding plaintiff of his rightful interest in the property and estate left by their mother. The trial court found that plaintiff had failed to establish the alleged trust and quieted the title in Mrs. Mollring. Plaintiff appeals.

There is much confusion in the record as to the proper sequence of dates of the various transactions involved in this litigation. For example, appellant's abstract gives the date of the commencement of this action as April 22, 1910, while the decree purports to have been entered January 24, 1910. The petition alleges, and the fact is stipulated, that Mrs. Schurz died September 12, 1908, while appellant in his reply argument asserts that she died September 12, 1907, although it seems to be conceded that the deed to Mrs. Mollring was not made before December 12, 1907. In still another part of the abstract the same deed is described as bearing date September 12, 1908, and acknowledged on the 13th day of the same month. While these defects are not insurmountable obstacles to a proper consideration of this case, they do add very materially to the labor of this court in marshaling the facts and developing the merits of the dispute. We mention them here, not by way of rebuke, but to direct the attention of all counsel preparing cases for this court to the great importance of careful proof reading of the printed record. It is too often neglected, and not infrequently to the great prejudice of some of the parties in interest.

The deed made by Mrs. Schurz to her daughter is in the ordinary warranty form and recites a consideration of \$15,000, which was the fair value of the property at that date. It contains no condition or stipulation attaching

any trust to the title which it purports to convey, and under our statute (Code, section 2918), no express trust can be ingrafted thereon by parol proof. *Richardson v. Haney*, 76 Iowa, 101; *Andrew v. Concannon*, 76 Iowa, 251; *Brown v. Barngrover*, 82 Iowa, 204; *Shaffer v. McCrackin*, 90 Iowa, 578. If therefore there was an effective delivery of this deed, then plaintiff's assertion that it was given simply to enable his sister to hold the title in trust for herself and her brothers must fail for lack of competent evidence, unless we are able to say that since said delivery she has so recognized and admitted the trust character of her title that equity will not permit her to find shelter under the statutory provision to which we have referred.

We have then first to inquire whether the deed has been shown to be ineffective for want of delivery. As Mrs. Mollring is in possession of the instrument and of the property therein described, there is a presumption of due delivery in her favor, and the burden is upon plaintiff to negative it by a preponderance of the evidence. *Parlin v. Daniels*, 111 Iowa, 640; *Blair v. Howell*, 68 Iowa, 619; *McGee v. Allison*, 94 Iowa, 527; *McCarthy v. Colton*, 134 Iowa, 658.

Delivery depends so largely upon the intent of the parties that no particular act or course of conduct with reference to the instrument can be said as a matter of

law to be necessary to its accomplishment.

The most usual method is for the grantor or someone acting with his authority to pass the deed over into the possession and control of the grantee with intent thereby to pass the title to the property therein described. It also frequently happens, especially as between parent and child, that the grantor executes a conveyance in due form and places it in the hands of a third person to be delivered to the grantee after the grantor's death, and this

is quite universally held to be a good delivery. *Dettmer v. Behrens*, 106 Iowa, 585; *White v. Watts*, 118 Iowa, 549; *Foreman v. Archer*, 130 Iowa, 49.

In the case at bar, the plaintiff claims, and offers evidence tending to show, that Mrs. Schurz became stricken with illness a short time prior to the date of the deed, and, in view of her condition, the two sons talked over property matters and agreed it would be advisable to have their mother transfer the title to Mrs. Mollring for the joint use and benefit of herself and her brothers. 'This, plaintiff says, was communicated to his mother by himself and W. H. Schurz, and she consented thereto on condition that the transaction be kept secret and she be left in full control of the property while she lived. Plaintiff himself drew the deed, and after it had been executed and acknowledged he says he took it to his mother, and at her direction placed it in a small box where she kept her papers. According to his story, the deed remained at all times in the possession of his mother until her death and was never given over to Mrs. Mollring nor any other person for delivery to her. On the other hand, W. H. Schurz testifies that at or about the time the deed was executed his mother placed it in his hands to keep for his sister. He further testifies that he kept the paper for some months in his office, when, his mother expressing some fear as to its safety there, he took it to her place of residence and placed it in an iron box belonging to her, locked the box, and himself kept and carried the key thereto until after her death, when he delivered the instrument to his sister. The key, he says, was given him by his mother with the injunction to take due care that if anything happened to her the deed should be given to his sister. If W. H. Schurz tells the truth with respect to this transaction, there was a sufficient delivery of the deed; but, if the version given by the plaintiff be correct, then there was no delivery. A similar question of veracity is raised between plaintiff and Mrs.

Mollring and between the latter and her uncle, John Lindt, who was present when the deed was prepared. Radical conflicts in evidence, which can not be reconciled upon any theory consistent with veracity and honesty on both sides, are very embarrassing to this court, which does not see the witnesses or observe their appearance and conduct on the stand. The story of a witness whose manner, appearance, and tone carry conviction of his untruthfulness to the mind of the trial court not infrequently appears entirely reasonable and credible when reduced to printed form. We are therefore inclined, even when hearing a case *de novo*, to give considerable weight to the conclusion reached by the court below upon questions of fact concerning which there is a marked dispute between witnesses equally well situated to know the truth. Moreover, the plaintiff has the burden of proving the nondelivery of the deed, and, even if the court should be unable to arrive at any satisfactory conclusion upon the question of credibility as between him and his brother, the presumption of due delivery which attaches to the possession of the deed by the grantee would remain and must be given effect. After a very careful examination of the record and consideration of all the testimony, we find nothing to justify us in overruling the trial court's finding that the deed was effectually delivered.

Assuming the delivery of the deed, we have then to consider whether the alleged trust has been established. Were it not for the statute, which seems to be an insurmountable obstacle to the relief asked, the writer of this opinion would be very strongly disposed to hold that plaintiff's theory of the transaction is the true one, and that the denial of his right in the property is an afterthought growing out of the dissensions which have arisen between the children of the deceased since the removal of her harmonizing presence and influence by death. But when we eliminate, as we must, all parol testimony as to the negotiations attending

4. TRUSTS: how  
created: evi-  
dence.

the making of the deed, there is not sufficient left on which to base the finding that the deed is otherwise than it appears to be—an ordinary and unconditional conveyance of the fee to the grantee in her own right. It may be true, as argued in plaintiff's behalf, that even an oral declaration of an express trust will be enforced in a court of equity when the person sought to be charged therewith has once recognized its obligation and undertaken its performance; but the showing made in this direction is not of that clear, unequivocal and satisfactory character which the law requires to overcome the presumptions in favor of absolute ownership in the grantee of the deed. Some of the grantee's acts, statements, and correspondence may justify the suspicion that the discovery of the advantage which the statute gives her has led to a change in her attitude towards the plaintiff with respect to the property; but they fall far short of the full measure of proof which is demanded by the established rules applicable to cases of this nature. *Acker v. Priest*, 92 Iowa, 621. In occasional instances the statute works hardship and gives one so inclined an opportunity to disown a moral obligation to the injury of others; but experience has demonstrated that in general it operates rather to prevent, than to promote, fraud.

We conclude that the decree of the district court must be *affirmed*.

#### ON REHEARING.

MONDAY, DECEMBER 18, 1911.

PER CURIAM.—Upon a reexamination of the record in the light of additional arguments, we discover no reason for departing from the views expressed in the opinion heretofore filed.

Adhering thereto, the decree of the district court is *affirmed*.

**ELMER WILBUR V. EDWARD BUCKINGHAM, Appellant.**

**Appeal:** CONCLUSIVENESS OF VERDICT. The appellate court will not  
1 reverse a verdict rendered upon conflicting evidence, although it  
might have reached a different conclusion from the evidence.

**Injury to property:** DAMAGES: EXCESSIVE RECOVERY. In an action  
2 for injury to machinery the plaintiff is entitled to recover for  
broken parts on the basis of their value before injury, with the  
necessary cost of labor for installing new parts. In this action  
for injury to an automobile the recovery is held greater than  
warranted by the evidence.

**Evidence:** PRICE LISTS: RIGHT OF WITNESS TO REFRESH HIS MEMORY.  
3 Standard price lists and market reports shown to be of general  
circulation and relied upon by the trade are admissible as evi-  
dence of the market value of articles therein listed and priced:  
So that witnesses testifying to the value of such articles may re-  
fresh their memory by reference to the price lists thereof.

**Instructions:** FINDING TO CONFORM TO EVIDENCE. An instruction that  
4 the jury should "endeavor" to be governed solely by the evidence  
was not prejudicial, because permitting them to go outside of  
the record and determine the issues upon their own knowledge,  
experience or information, where they were also clearly told that  
plaintiff could not recover except upon proof of his claim by a  
preponderance of the evidence, that the finding must be from  
the evidence, and where the nature of the case was such that the  
jury could not have utilized their own knowledge, except in a  
general way.

**Appeal:** SUFFICIENCY OF ABSTRACT: OBJECTION. An abstract will not  
5 be stricken because of failure to number the lines, where the same  
was filed before the adoption of rules requiring numbering. And  
failure to include exhibits in an abstract must be taken advantage  
of by denial and not a motion to strike.

*Appeal from Union District Court.*—HON. H. K. EVANS,  
Judge.

TUESDAY, OCTOBER 24, 1911.

ACTION for damages to an automobile resulted in a judgment against defendant, from which he appeals—*Affirmed* on condition of remission of part of recovery.

*Hunn & Jones and P. C. Winter*, for appellant.

*Jas. G. Bull*, for appellee.

LADD, J.—On April 28, 1909, plaintiff left his automobile in defendant's barn, and went to Missouri. He returned about July 1, and upon examining the machine discovered, as he testified, that it had been damaged. He demanded of defendant that he put it in as good condition as when delivered in his barn. The defendant declined to have it repaired, and insisted that the machine was in substantially the same condition as when left with him, and that, if used, this was with the plaintiff's consent. Plaintiff denied having authorized use, save by one Shatto, for purposes of demonstration. These issues were decided by the jury in favor of the plaintiff, and though we might not have reached the same conclusion, the evidence was such as to preclude interference with the verdict.

II. It is also contended that the damages allowed were excessive. Though plaintiff supposed the machine, a Ford runabout, to have been a 1908 model, it had been licensed in 1906, and he was its fourth owner after leaving the factory. Moreover, it was so worn then that he was unable to drive it to Orilla, eight or ten miles south of Des Moines, and, after procuring a machinist to assist, was compelled to ship it to Lorimer by railway. Upon reaching that place, the machinist repaired the machine, putting in a new differential gear, and, after running it about a mile, stored it as related. The plaintiff testified that, upon examining the machine about July 1, "the crank case

1. APPEAL: CON-  
clusiveness of  
verdict.

2. INJURY TO  
PROPERTY:  
damages: ex-  
cessive recov-  
ery.

was broken, the connection rod boxing worn, and two cylinders badly worn, and a piston head broken, the differential case was broken, and the gears worn, also the transmission. These transmission gears were the new ones I had put in. One spring was broken, the brace was broken, and the front axle was bent backwards, so the wheels set together in front and out at the bottom." There was evidence that the cost of the new parts to replace those broken or worn would be less than \$50, and that the value of the labor in replacing them and putting the machine in repair would be from \$25 to \$60. Plaintiff also testified that the "best tire is now in worse condition than the worst was when I got it. . . . The tires were in good condition when I bought the machine. There were no holes in them. I couldn't tell for certain when these tires were put on that machine." His brother testified that he noticed that "the tires were ruined—entirely ruined," and there was other evidence that new tires then cost \$50 apiece. This was all the evidence bearing on the measure of damages, save that in behalf of defendant, tending to show that the machine was in substantially the same condition July 1 as when first placed in defendant's barn. It is manifest from this recital of the evidence that the damages proven did not amount to the \$165 awarded. Even if new tires for this machine did cost \$50 each (which we doubt), and three of those on it were "ruined," there was no evidence of the value of these when the automobile was placed in the barn, nor the extent they were then worn, even though in a good condition generally. Plaintiff was not entitled to the value of new tires, but of those which had been "ruined," and this is to be said of other parts. The evidence, when fairly considered, did not justify an award of more than \$100 in damages.

III. Two witnesses testified to the value of the parts of the machine necessary to replace those injured. Neither was able to estimate such values without referring to and

refreshing his memory from a printed catalogue of prices issued by the Ford Motor Company, and on this ground their competency to testify was challenged. It appeared that such parts could be procured from that company or its branch houses only, being manufactured for use in its particular auto models, and that in ascertaining the cost of parts thereof resort was ordinarily had to this catalogue. One of the witnesses, over objection, was allowed to consult the catalogue, and whether the other did does not appear. Standard price lists and market reports, shown to be in general circulation and relied on by the commercial world and by those engaged in trade, are admissible as evidence of market values of articles of trade. *Duer v. Allen*, 96 Iowa, 36; *St. Louis & S. F. R. Co. v. Pearce*, 82 Ark. 353 (101 S. W. 760, 118 Am. St. Rep. 75); *Sisson v. Railway Co.*, 14 Mich. 496 (90 Am. Dec. 252); *Nash v. Classen*, 163 Ill. 409 (45 N. E. 276); *Mt. Vernon Brewing Co. v. Teschner*, 108 Md. 158 (69 Atl. 702, 16 L. R. A. (N. S.) 758); *Chicago, B. & Q. R. Co. v. Todd*, 74 Neb. 712 (105 N. W. 83); *Mosley v. Johnson*, 144 N. C. 257 (56 S. E. 922); 3 Wigmore, section 1704.

The evidence disclosed that the catalogue or price list was of parts manufactured especially for particular machines, i. e., those of the Ford Motor Company, that it was printed for use of the trade generally, and we think it was competent for the witness to refresh his memory therefrom, and testify as to the cost of the several articles. He could not be expected to remember the prices of a large number of articles, and for this reason might well have been permitted to refresh his memory. *Nelson, Morris & Co. v. Columbia Iron Works & Dry Dock Co.*, 76 Md. 354 (25 Atl. 417, 17 L. R. A. 851). There was no error in receiving the evidence.

IV. In the last part of the sixth paragraph of the charge, the court instructed the jury that "all evidence

3. EVIDENCE:  
price lists:  
right of wit-  
ness to refresh  
his memory.

should be considered, together with all the facts and circumstances shown on the trial; and the jury should endeavor to be governed solely by the evidence introduced before them for the purpose of determining, honestly and dispassionately, the very truth of the matters at issue." Exception is taken to the use of the word "endeavor" for that, as is contended, it inferentially permitted the jury to go outside of the evidence and draw "upon their own knowledge or experience for information, fancied or real, as a basis for their verdict." Undoubtedly the words "endeavor to" should have been omitted, but no prejudice could have resulted from their use. The jury had been told in two previous instructions that before plaintiff could recover, he must prove his claim by a preponderance of the evidence, and in the fourth and fifth instructions that the finding of the jury must be from the evidence. Moreover, the nature of the case was such that the jury could not well have utilized information, other than their general knowledge of the construction of automobiles, for the issues related to the condition of a particular machine when placed in defendant's barn, and some months later, and the extent of the damages thereto. The error was not prejudicial.

V. Appellee moved to strike appellant's abstract, for that (1) the lines were not numbered, and (2) certain exhibits were not included. As the abstract was filed before the rules required the lines to be numbered, and as the objection that the abstract did not contain all the record essential to a decision can only be raised by specific denial, the motion is overruled. Section 4118, Code. If appellee shall file a remittitur of \$65 of the amount allowed within thirty days, the judgment will be *affirmed*; otherwise, *reversed*.

4. INSTRUCTIONS:  
finding to conform to evidence.

5. APPEAL: sufficiency of abstract: objection.

CHARLES H. KINKEAD, Appellant, v. R. M. PEET, Appellee.

**Accounting:** APPEAL: REVIEW. The appellate court in a suit for an  
1 accounting, involving a large number of items, will not act as a  
master in chancery and state the account between the parties,  
where the decree appealed from gives no intimation of the claims  
allowed and disallowed, but will classify the items, giving its  
view thereon, and remand the case for the entry of judgment in  
conformity therewith.

**Mortgages:** MORTGAGEE IN POSSESSION: ACCOUNTING. A mortgagee  
2 in possession holds the property in trust for the benefit of the  
mortgagor after payment of the debt secured thereby, and where  
action is brought to redeem it becomes the duty of the mortgagee  
to promptly account for his trust.

**Same.** Where a mortgagee in possession is entitled to wages paid  
3 for labor on the mortgaged premises he is also entitled to the  
cost of boarding the laborers.

**Same.** A mortgagor entitled to redeem from a mortgagee in pos-  
4 session may recover for waste committed to the material injury  
of the premises.

**Same:** ACCOUNTING FOR REPAIRS. A mortgagee in possession may  
5 make such repairs as are reasonably necessary to preserve the  
estate in the condition in which he received it, and is entitled to  
credit therefor in a settlement with the mortgagor who is seek-  
ing to redeem; but generally he may not go beyond necessary re-  
pairs and make betterments at the expense of the mortgagor or  
of the property itself unless by the mortgagor's express or im-  
plied consent. Under this rule the cost of tiling, the erection  
of new buildings or reconstruction of old ones should not be  
allowed the mortgagee.

**Same:** COST OF RELEASING ATTACHMENT. The amount a mortgagee  
6 in possession was compelled to pay to release the property from  
an attachment, with interest from the date of payment, but not  
including costs of suit, should be allowed the mortgagee in an  
accounting upon redemption, especially where it was contemplated  
by the parties that the mortgage should stand as security therefor.

**Same:** SERVICES OF MORTGAGEE IN POSSESSION. A mortgagee in pos-  
7 session should not be allowed for his own services in connec-

tion with the mortgaged property voluntarily rendered and for his own benefit and protection.

**Same:** REDEMPTION: TENDER: INTEREST. Where the amount required 8 to redeem from a mortgage is liquidated and no accounting is required, a sufficient tender will usually arrest the accumulation of interest; but where the mortgagor is in court claiming payment, or a material reduction of the debt because of equitable counterclaims which he insists should be treated as payments, and is asking for an accounting, the rule does not apply. Yet where the mortgagee denies the trust and prolongs the litigation, as in this case, it is proper to compute the interest without annual rests or compounding the same.

Evans, J., dissenting.

*Appeal from Linn District Court.*—HON. MILO P. SMITH,  
Judge.

THURSDAY, OCTOBER 26, 1911.

THE opinion states the nature of the action and the material facts.—*Reversed and remanded.*

*Rickel & Dennis*, for appellant.

*Jamison, Smyth & Hann*, for appellee.

WEAVER, J.—At the outset of the transactions from which this controversy has arisen, the plaintiff, Charles H. Kinkead, was the owner of two hundred and seventy-six acres of land in Linn County, and a house and lot in the town of Springville. A mortgage upon said land was made by Kinkead and wife to Helmer & Gortner to secure the payment of a note for \$13,000, bearing date June 19, 1902, of which note and mortgage the defendant, Peet, thereafter became owner by assignment. Soon thereafter a second mortgage on the same property was made by Kinkead and wife to James K. Hakes to secure an indebtedness of \$9,000. Later Hakes assigned this mortgage to Peet as collateral security upon a debt of his own. In

November of the year 1904, Kinkead and his wife having separated, she brought suit against him for divorce and alimony, and in aid of her claim procured a writ of attachment and levied upon her husband's personal property, which was of considerable value. On or about November 18, 1904, after negotiation between Kinkead, his wife, Peet, and Hakes, Mrs. Kinkead released her attachment, and subsequently the divorce proceedings were abandoned. At the same time Kinkead and his wife united in the execution and delivery of a deed of the real estate to Peet. They also gave him a bill of sale vesting him with the legal title to all their live stock and other personal property. Later Peet took possession of both real estate and personal property, and asserted absolute ownership thereof in himself. Thereafter Mrs. Kinkead brought an action at law against Peet and Hakes to recover the sum of \$3,000 which she alleged they had promised to pay her in consideration of the release of her attachment above mentioned and of her uniting with her husband in the conveyance to Peet. In this she was successful, recovering a judgment against both Peet and Hakes for \$3,000 and interest. On appeal to this court said judgment was affirmed. *Kinkead v. Peet*, 136 Iowa, 590. About the same time the husband, Charles H. Kinkead, brought an action in equity to have the deed and bill of sale decreed to be in the nature of a mortgage only, and that he be permitted to redeem therefrom, and Peet be required to account for the personal property received under said bill of sale, and for waste, rents, and profits of the real estate. On trial in the district court Kinkead's petition was dismissed, but on appeal to this court said decree was reversed, the deed and bill of sale were held to constitute a mortgage only, and the cause was remanded to the district court for an accounting and determination of the amount which plaintiff must pay to make redemption. *Kinkead v. Peet*, 137 Iowa, 692. A trial of this question was thereupon had

and the remainder due to Peet after crediting the plaintiff with all allowances was found to be \$24,427.41, and time fixed within which it should be paid. From the decree so entered the appeal now before us was taken.

I. The foregoing somewhat protracted statement has been thought necessary to make easier of comprehension the attitude and claims of the respective parties. We

shall not, however, go into any consideration of the merits of the earlier controversies to which we have made reference. They have

1. ACCOUNTING:  
appeal: re-  
view.

been fully and finally adjudicated by the decisions of this court upon the two former appeals, and the single inquiry now left is the matter of accounting. It is much to be regretted that the decree of the trial court is wholly general in its finding, and gives us no hint of the particular claims and counterclaims which were allowed or disallowed in computing the amount required to redeem. The only basis of inference as to these matters is derived by comparing the remainder adjudged to be due from the plaintiff with the claims made by the parties in pleading and argument, and from this it would seem that substantially all the defendant's claims were found to be just and equitable, and that the credits claimed by the plaintiff except for rents and profits and a few other items were generally disallowed. It seems evident, also, that defendant was allowed interest, not only upon the mortgage debts held by him, but also on all the several claims included in his accounting.

In reviewing a decree so entered upon a record such as is here furnished, we do not think this court is called upon to perform the functions of a master or referee in chancery, and state the account between the parties in detail. The items involved are hundreds in number, ranging from hog hooks and spinning wheels to blooded live stock, and from lumber wagons and harvesters to chickens and rat traps. They include, also, claims for rents and

waste and conversion, on the one hand, and for repairs and improvements and multitudinous alleged expenditures and services, on the other. We shall therefore content ourselves with attempting a classification of the conflicting claims and demands into convenient groups, and, after indicating our views with respect thereto, shall remand the case for the entry of a decree accordingly. This is the more necessary as we may assume that other rents and profits have accrued and other taxes paid since the entry of the decree appealed from.

The nature of the claims or credits demanded by the plaintiff is as follows: (1) For the value of the personal property alleged to have been turned over to or converted by the defendant. (2) For use and rents and profits of the land after plaintiff was ousted by defendant. (3) For waste committed upon the property while in defendant's possession. On the other hand, defendant, while denying liability on a large part of these claims, asks to be allowed (1) for the amount of principal and interest unpaid on the first mortgage debt; (2) for the amount of unpaid principal and interest on the second mortgage debt; (3) for money expended in payment of plaintiff's debts at his request; (4) for amount of the judgment interest and costs recovered by the wife of plaintiff against defendant and paid by him; (5) for costs of repairs on buildings during the defendant's occupancy of the land; (6) for tiling and other improvements upon the land during said occupancy; (7) for taxes paid; (8) for labor and services expended by defendant in caring for the property; (9) for interest on each item charged in his account from date thereof to final decree.

As a starting point for the consideration of these matters, it is well to recall the situation in which the prior litigation had left plaintiff and defendant.

It had been determined that the deed and bill of sale to defendant were in equity a mortgage only. Defendant's

legal title and possession were therefore held by him in trust for the benefit of plaintiff after the payment of the indebtedness thereby secured. When, therefore, the plaintiff demanded the right to redeem and brought action for its enforcement, it was the duty of the defendant to promptly make accounting of his trust, present a showing of the secured indebtedness and other claims, if any, which were equitably chargeable against the mortgaged property, and thereon to give due credit for rents and profits and for all personal property, if any, which he had received from the plaintiff and converted to his own use. The extent of his right was the recovery of the balance or remainder thus ascertained, and this the court would have secured to him by a proper decree. This trust he wrongfully repudiated, and resisted the plaintiff's right of redemption through a protracted litigation. It was while thus denying his trust and asserting absolute ownership in himself that the bulk of his claims in addition to the mortgage debts accumulated. During all this time the plaintiff has stood in court seeking to exercise his right to redeem, and demanding as a necessary preliminary thereto that defendant make an accounting, and that the remainder due on the debt be ascertained. This attitude of the parties and their relation to each other and to the property have a material bearing upon the controversy, as we shall hereinafter have occasion to notice.

II. The bill of sale taken by defendant was made to cover all and every kind of personal property on the farm, among which it is conceded there was a drove of hogs, horses, cattle, vehicles, farm machinery, tools, and appliances with which the average farm is supplied. There was also a large field of corn, mostly unharvested, variously estimated at from one hundred and sixty-two to two hundred acres. No part of these things has ever been restored to the plaintiff, and he is obviously entitled to credit therefor. Defendant concedes that he sold a part of the hogs

2. MORTGAGES:  
mortgagee in  
possession:  
accounting.

for \$1,359.14, and made use of certain others which the evidence shows were worth about \$75, and, as this was done before defendant denied the mortgage character of the transfer of property and the parties seem to have treated the delivery of the hogs as a payment upon the debt secured by such transfer, it will be so treated here and applied as a payment at that date of \$1,532. The item of corn is the subject of much dispute, but we think the weight of the evidence is to the effect that there was one hundred and sixty-two to two hundred acres, yielding a crop of which after allowing for the amount fed to the Kinkead stock up to March 1, 1905, there was a remainder which we estimate at 3,500 bushels, worth forty cents per bushel. Against the last item plaintiff concedes defendant to be entitled to credit, or deduction by the amount expended for husking to which credit reference will later be made. Of the cattle there were six or seven cows, five or six yearlings, one or two steers, and several calves. The exact number and value of each is not agreed upon, but the aggregate may be reasonably estimated from the evidence at \$375. There were also fourteen horses, over the value of which there is the same wide divergence of estimates. From the evidence taken as a whole on this branch of the case we think plaintiff should have credit for them at an average value of \$120 each or \$1,680. In addition to the foregoing, plaintiff produces a very long list of farm machinery, implements, vehicles, and many miscellaneous items of small tools and appliances which are apt to accumulate on and about a large farm. Many of these appear to have had substantial value, while many more could not fairly be considered as worth more than a merely nominal sum. Enthused by the prospect of a forced sale to his antagonist, the plaintiff has persuaded himself that this remnant of his personal estate was worth over \$2,000; while the defendant under the stress of opposing interest thinks it was worth practically nothing. We shall not

attempt any reference to these items in severalty. The machinery, implements and vehicles and some of the more miscellaneous articles were clearly such as should be paid for, while many others may be passed as negligible. From the best data the record affords we estimate this list at \$625, and plaintiff will have credit accordingly.

Coming next to the rental value of the farm since the ouster of plaintiff, we have to say it is shown to be not less than \$3.37½ per acre per year. Defendant will concede no more than \$2.75, while plaintiff's figure is \$6.50. The testimony on both sides is largely of a partisan character, but the estimate above made is as near the proper figure as can be ascertained from the record. The matter of plaintiff's claim for waste and damage to the realty will be considered in a subsequent paragraph of this opinion.

III. Of the claims asserted by the defendant, plaintiff concedes that upon March 1, 1905, when defendant first definitely asserted absolute ownership of the property, there was due to defendant upon the first mortgage debt principal and interest to the amount of \$14,257.14, and upon the second mortgage debt to the amount of \$5,124.46, and that defendant was also entitled to credit for moneys expended in payment of claims against plaintiff to the amount of \$575, for expense of husking the corn crop \$108.35, and for taxes paid. We may therefore pass these items as established by consent. There appear to be other items of costs and expenses paid by defendant for plaintiff arising from the divorce proceedings for which he should be given credit to the amount of \$107.60.

The credit conceded by plaintiff for wages paid for corn husking does not include an item for \$24.50 paid for the board of the huskers. If, as plaintiff admits, defendant should be reimbursed for the wages of  
3. SAME. these men, we see no good reason why he should not also have credit for this expenditure for board as well, and it will therefore be allowed.

IV. The plaintiff's claim for waste and damage and defendant's counterclaim for repairs and improvements may be considered together. Defendant having been deter-

4. SAME: mined to be a mortgagee in possession from whom plaintiff as mortgagor is entitled to redeem, it is an elementary proposition, requiring no citation of authority, that, if during his possession defendant has committed any waste on the premises to the material injury of the realty, he is chargeable therewith in the accounting.

It is equally well settled that while in possession he may make such reasonable repairs as are necessary to preserve the estate in the condition in which he receives it, and will be allowed due credit therefor.

5. SAME: accounting for repairs.

The extent of this latter right has some equitable relation and proportion to the purpose and object of his possession. If the mortgagee assumes control of the property before condition broken to preserve and manage it for some indefinite period for the preservation or enhancement of his security, it may well be that more elaborate repairs would be held justified than would be the case where condition is already broken, and he takes possession simply to preserve the property and security pending foreclosure. In neither case, generally speaking, is he authorized to go beyond necessary repairs, and make improvements and betterments at the expense of the mortgagor, or of the property itself. *Montgomery v. Chadwick*, 7 Iowa, 114; *Moore v. Cable*, 1 Johns. Ch. (N. Y.) 385; *McAbee v. Harrison*, 50 S. C. 39 (27 S. E. 539); *McCumber v. Gilman*, 15 Ill. 381; *Marshall v. Stewart*, 80 Ind. 189; *Malone v. Roy*, 107 Cal. 518 (40 Pac. 1040); *Gresham v. Ware*, 79 Ala. 192. To hold otherwise would enable a mortgagee to increase the burden of the mortgagor without his consent, and perhaps make it impossible for him to redeem, and, as some of the books have put it, the mortgagee will not be per-

mitted to "improve the mortgagor out of his estate." Of course, where exceptional circumstances are shown indicating the mortgagor's express or implied consent to the improvements, such claims are sometimes allowed. See *Montgomery v. Chadwick*, *supra*; *Moore v. Cable*, *supra*. In the case before us there is no such consent shown. During the six years of defendant's occupancy, the plaintiff has not only been objecting to such possession, but has been in court, insisting upon his right of redemption. The improvements for which defendant claims compensation have been made while this litigation has been in progress, and, save so far as the work and the expense incurred may be classed as repairs necessarily made for the preservation of the estate, we know of no rule or principle of law which will enable him to charge the same to the plaintiff. The fact that the first decree in the district court was in favor of the defendant can not affect this situation, for the litigation has been continuous, and he must be held to have known the liability of an unfavorable final adjudication. He was at liberty, of course, to wager the cost of the improvements upon his judgment of the outcome, but he could not impose upon plaintiff any obligation to make him whole in case he should lose. *Malone v. Roy*, 107 Cal. 518 (40 Pac. 1040); *Gresham v. Ware*, 79 Ala. 192; *Miller v. Curry*, 124 Ind. 48 (24 N. E. 219, 374).

The improvements made by the defendant were not made under any pretense or claim that as mortgagee in possession he was exercising his right and duty to preserve the estate from deterioration and decay, but he was stoutly denying plaintiff's right therein, and asserting an absolute title in his own right. In *Mahoney v. Bostwick*, 96 Cal. 53 (30 Pac. 1020, 31 Am. St. Rep. 175), the defendant as in this case at bar took a deed absolute in form to secure the payment of the grantor's debt. Under this deed, he obtained possession of the land, but repudiated the mortgage agreement, and claimed the property as

his own. In an action brought to declare the deed a mortgage and for an accounting, defendant claimed credit for fencing and ditching done by him on the premises. This was denied by the trial court. On appeal this holding was affirmed by the Supreme Court, saying: "The possession of the defendant and all that he did upon the land were acts hostile to the title of the plaintiff, and plaintiff is not required in this action, upon any principle of law or equity, to account to defendant for the value of the improvements thus made by him. . . . The fence was constructed by defendant for himself and in assertion by him of a right to exercise adversely to plaintiff dominion over the land upon which it was erected, and plaintiff can not be made to pay for it, although it may appear that he himself would have built it if he had not been ousted from possession." It is suggested by counsel that the work done by the defendant may be classed as repairs. We think this can not be so as to the tiling which constituted a large item of his claim. The same may be said for the other large item for work done upon the barns and other buildings. While this may in one sense be called a work of repair, it was of that extraordinary and extensive kind not contemplated by the law in the rule we are now considering. The mortgagee's possession is of a temporary character, and the extent of his duty in keeping up the property is to make such repairs as will preserve the estate from unnecessary waste or depreciation in his hands. Except under quite extraordinary circumstances, he would not be expected to put up new buildings or to reconstruct old ones, and, if he surrenders the estate in as good condition as he received, he has done his full duty. Beyond that he acts as a volunteer. Undoubtedly the defendant did expend some time and money in repairs of a legitimate character for which he became equitably entitled to compensation. The amount thereof is not large, but we shall not undertake to state it in dollars and cents, for in our

judgment the utmost defendant is entitled to in compensation for repairs made is not in excess of the amount with which he should be charged for waste in the cutting of trees and removal of fences and other improvements. This claim and counterclaim may fairly be disposed of by setting them off and allowing each to extinguish the other.

V. Concerning the judgment recovered by Mrs. Kinkead against defendant and since paid by him, we are very clear that he is equitably entitled to credit in this accounting. If the conveyance to defendant had

6. SAME: cost of releasing attachment.

been absolute in fact and not a mortgage, and he had procured Mrs. Kinkead to unite therein upon his promise to pay her \$3,000, then, of course, her recovery from him of the agreed consideration would not of itself entitle him to demand reimbursement from her husband. But it is not denied by plaintiff that his personal property was then under seizure by attachment at the suit of his wife. At the same time defendant was the holder of one or more mortgage liens upon his land and upon part of the personal property. In this condition the somewhat complicated transaction of November, 1904, took place, in which plaintiff was an active participant. Plaintiff by the aid of defendant's promise to the wife obtained a release of the attachment, and immediately conveyed his entire estate, real and personal, to the defendant. He claims, and the court has found, that these transfers were by way of security only, and we are satisfied that both parties understood the security to cover whatever sum defendant should pay to Mrs. Kinkead for the release of her rights, as well as the mortgage debt and other debts mentioned in the pleadings. Defendant must, therefore, be credited with the sum of \$3,000 so expended. Concerning interest upon this item, the court is equally divided as to the date from which it should be allowed. There is, however, an agreement as to its propriety from the time when the debt was actually paid, and interest will be computed

on that basis. No allowance to be made for costs or expenses incurred in that litigation.

VI. Defendant can not be allowed compensation for his own services rendered with reference to the mortgaged property. They were not rendered for plaintiff or at his

7. SAME: services of mortgagee in possession.

request. They were rendered presumably at defendant's own instance and for his own benefit and protection, and their value can

not be tacked to the mortgage or assessed against the property. Such is the quite universal holding of the authorities. *Elmer v. Loper*, 25 N. J. Eq. 475; *Blunt v. Syms*, 40 Hun, 566; *Snow v. Warwick*, 17 R. I. 66 (20 Atl. 94); *Breckenridge v. Brooks*, 9 Ky. 335 (12 Am. Dec. 401); *Benham v. Rowe*, 2 Cal. 387 (56 Am. Dec. 342).

VII. The several claims of the parties for allowance of interest may be disposed of as follows: Compute the unpaid interest on the secured notes to March 1, 1905, the date when defendant ousted plaintiff and asserted title in himself. Aggregate the several allowances hereinbefore made to the plaintiff (except rents and profits), and having deducted from this sum the credit allowed defendant for money paid out and expended for plaintiff (not including the judgment obtained by Mrs. Kinkead), apply the remainder as a payment of that date on the mortgage debt. Compute interest on the remainder without compounding and without rests to the date of the final decree. Treat the yearly allowance for rents and profits, less taxes paid, as a payment made at the close of each twelve-month period, and compute interest thereon (at the mortgage rate) to date of decree, and, having applied the sum of these payments and interests to the sum of the mortgage debt and interest, the remainder will represent the amount required for redemption, save only the matter of defendant's claim on account of the judgment recovered by Mrs. Kinkead. For this he should be permitted to recover the sum of \$3,000, with interest thereon from the date when he actually paid

it, but such allowance will not include interest or costs accrued upon the claim prior to such date.

It is insistently argued by appellant that interest upon the principal debt should cease from the date when defendant resisted plaintiff's right to make redemption.

It is true that where the amount to be paid is liquidated, and no accounting is required, a sufficient tender by the debtor will ordinarily arrest the accumulation of interest, and, upon final judgment, the creditor will ordinarily be compelled to accept the amount due at date of tender without interest or cost thereafter accruing. But the case before us does not come within the principle thus conceded. Plaintiff is not in court tendering payment of an admitted debt. In effect, he comes into court claiming that his debt has been satisfied or materially reduced by certain equitable counter-claims which should be treated as payments, and asks an accounting concerning them. In the nature of things an accounting can not be had forthwith. Time must be taken for investigation and trial of the several issues raised, and it would be inequitable to say that pending such settlement defendant should forfeit all interest, and at the same time be held chargeable with the rents and profits of the land. It is true that he wrongfully denied the trust character of his title, and by his resistance of plaintiff's right to redeem has long postponed the day of settlement. For that reason, we provide that there shall be no annual rests or compounding of interest in his favor, but beyond that equity does not require us to go.

VIII. The rules stated and the conclusion reached in the foregoing paragraphs will result in materially reducing the amount required for redemption of the land as fixed by the court below. It follows that the decree appealed from must be reversed and cause remanded for adjustment of the accounting upon the basis hereinbefore indicated, taking into consideration rents and profits accrued and taxes

paid, if any, since the former trial. The costs of the appeal will be taxed to appellee. Let the decree when entered provide for plaintiff's right to redeem by payment of the amount found due within three months from the date of such decree.

*Reversed and remanded with directions.*

EVANS, J. (dissenting).—I feel compelled to dissent from the majority opinion. So far as fact questions are concerned, there is much diversity and exaggeration in the evidence. I am impressed that the majority is unduly liberal toward the plaintiff in the allowances made in his favor. In view of the conflicting state of the evidence, I would not be willing to dissent from my brothers on that ground. There are, however, two or three definite points wherein the majority opinion in my judgment fails to administer equity to the defendant.

I. I can see no reason, legal or equitable, why the defendant should not be allowed the full amount paid by him to the plaintiff's wife, including the interest thereon. Defendant, Peet, obtained his deed of the farm in the fall of 1904, and obtained possession of the farm thereunder in March, 1905. At the time he obtained his deed, the plaintiff Kinkead's wife was prosecuting an action for divorce against him, and had caused a writ of attachment to be levied upon his property. It had been orally agreed between Kinkead and his wife that her alimony should be \$3,000. On March 14, 1905, she brought an action against Peet to recover \$3,000. She alleged that Peet had orally agreed with her to pay the same in consideration of her signing the deed and releasing the attachment. Peet denied then, and denies now, that he ever made such an agreement with Mrs. Kinkead. In the trial of such action the evidence was such as to have warranted a verdict by the jury for either party. The verdict was for the plaintiff, and the final outcome of the litigation was that Peet

was compelled to pay \$3,000 with interest from March, 1905, amounting to \$3,511, not including any costs or expense of trial. Kinkead aided his wife in the recovery of the judgment against Peet, although he did not testify that Peet had agreed with him to pay the same, nor was he present at the alleged conversation with the wife. There is no room to claim that Peet acted in bad faith in defending against the suit of Mrs. Kinkead. Nor was the plaintiff, Kinkead, prejudiced in any manner by such defense. If the defense had been successful, it would have operated in his favor. The fact that Peet was compelled to pay this amount in order to get the property is the basis of his claim against Kinkead for the amount so paid out. Peet was held liable for the money as of March 1, 1905. The liability of defendant to him was presumptively commensurate with his liability to Mrs. Kinkead. Kinkead was not hurt by the delay in payment to Mrs. Kinkead. His liability was in no sense enlarged thereby. According to the majority opinion, his liability was substantially decreased thereby, and I am constrained to disagree with the holding at this point. There is another fact to be borne in mind. Since that litigation it has been adjudged that plaintiff's deed was intended as a mortgage. In prosecuting that litigation plaintiff, Kinkead, testified that the deed was intended to secure, not only existing indebtedness, but also money to be paid out by Peet in the future, and this included even alleged wages to be paid to Kinkead himself. He testified: "Everything he paid out was to be paid back. Of course, I was to pay interest on the amount of the indebtedness." Kinkead also testified that he requested or authorized Peet to pay the \$3,000 to his wife, and that Peet did not agree to do so. This was prior to the time of the alleged oral agreement between Peet and Mrs. Kinkead as testified to by her. So that, according to the plaintiff's own contention, the title to the farm was to be held as security for such money as

might in the future, be paid out by Peet for the benefit of Kinkead. Such an arrangement impliedly included interest as well as principal.

II. When Peet took possession of the farm, the buildings thereon were in a dilapidated condition and in urgent need of repair. Such repairs were made by Peet. The principal repair consisted in putting in a cement floor in a cow barn in lieu of an old plank floor which had completely rotted away. The actual expense of such repairs amounted to a few hundred dollars. These are disposed of in the majority opinion by offsetting them against alleged waste. I do not think this record would justify any allowance whatever to the plaintiff for alleged waste. Indeed, one of the claims of waste is that there were not sufficient repairs made. I think the defendant should be allowed his reasonable expenditure for the repairs shown.

III. The defendant caused about 1,100 rods of tiling to be put upon the premises at an expense of \$400 or \$500. This tiling was highly beneficial, and rendered tillable a portion of the ground the use of which was of no value whatever prior thereto. This claim is disallowed by the majority on the theory that it involved an improvement rather than a repair. The line between repairs and improvement is not always easily drawn. In view of Kinkead's own showing, "that everything he paid out was to be paid back," we are not called upon to draw the line in the present instance. The rental value of the farm has been charged to the defendant in its actual condition, and this includes tile.

It seems to me inequitable to permit the plaintiff to take the land without repaying the expenditure for this marked benefit.

STATE OF IOWA v. BERT CONKLIN and MRS. BERT CONKLIN, Appellants.

**Appeal:** WAIVER OF ERROR. Alleged errors concerning which there is no brief or argument will not be reviewed on appeal.

**Criminal law:** CONCEALING STOLEN PROPERTY: EFFECT OF VERDICT. Conviction for aiding in the concealment of numerous stolen articles, no election as to the particular article having been required by the court, is an implied conviction for aiding the concealment of all articles enumerated in the charge.

**Same:** EVIDENCE OF ABSENT WITNESS: HOW PROVEN. The testimony of a witness on the first trial of a criminal case, but who on the second trial is beyond the jurisdiction of court, may be proven in substance by those who heard it, even though it was not taken in short hand.

Weaver and Evans, JJ., dissenting.

**Same:** CONCEALMENT OF STOLEN PROPERTY: POSSESSION. It is not essential to a conviction for concealing stolen property that the accused should have had actual possession of the same; it is sufficient if he knew it was stolen and aided in its concealment.

*Appeal from Washington District Court.—HON. K. E. WILLCOCKSON, Judge.*

TUESDAY, NOVEMBER 14, 1911.

THE defendants were convicted of receiving and concealing stolen property, and appeal.—*Affirmed.*

*P. J. Hanley*, for appellants.

*George Cosson*, Attorney-General, and *John Fletcher*, Assistant Attorney-General, for the State.

SHERWIN, C. J.—The defendants were originally tried

in justice court on an information charging that they had knowingly received and aided in concealing certain stolen property, consisting of onions, cabbage, potatoes, and other articles therein specified; said property having been stolen by one Enos Dean. They were convicted before the justice, and appealed to the district court, where they demurred to the information, on the ground that it charged more than one offense, that it failed to set out the names of the owners of the property, and was bad for duplicity. The demurrer was overruled, and thereupon the defendants entered pleas of not guilty and of former acquittal. At the close of the state's evidence, it was required to elect on which of the articles alleged to have been stolen and concealed it would rely for a conviction, and the state then elected to rely upon the charge that the defendants had received and aided in concealing two bunches of shingles. The trial then proceeded, and the defendants were again found guilty.

I. The appellants present no brief or argument on the error claimed to have been committed in overruling their demurrer to the information, and we need not give the subject further consideration.

II. No election was required by the justice, and the defendants say that, as they could only be convicted of receiving and concealing one of the articles enumerated in the information as having been stolen and concealed, they were acquitted of all of the other charges contained in the information. But the jury before whom the trial was had in the justice court found the defendants guilty as charged in the information, and this implied a conviction on every material allegation in the information. *State v. Turner*, 19 Iowa, 144.

III. Enos Dean, who stole the property in question, was a witness for the state on the trial of the defendants

1. APPEAL: waiver  
of error.

2. CRIMINAL LAW:  
concealing  
stolen prop-  
erty: effect  
of verdict.

before the justice, and was fully cross-examined by counsel for the defendants. When the trial took place in the district court, Dean was in the state of Washington, and, of course, beyond the reach of the process of the district court. His testimony on the trial before the justice was not taken in shorthand, but the justice testified on this trial that he made a memorandum of Dean's testimony as it was being given, and that he could repeat the substance of it by refreshing his recollection from such memorandum. The justice was then permitted to testify as to what Dean said when a witness on the first trial. One of the jurors who served on the trial in justice court was also allowed to state what Dean had there testified to. The admission of this testimony is the foundation of the appellant's most serious complaint. We have recently held that the stenographic notes of the testimony of a witness for the state in a criminal trial may be used on a retrial of the same case, where the witness is, at the time of the second trial, living, but beyond the jurisdiction of the court. *State v. Grant Brown*, 152 Iowa, 427. We had theretofore held that such evidence was competent in case of the death of the witness. *State v. Fitzgerald*, 63 Iowa, 268; *State v. Kimes*, 152 Iowa, 240. And we have also held that it is competent to prove the substance of the testimony of a deceased witness, even though such testimony be not taken down in writing. *State v. Fitzgerald, supra*; Greenleaf on Evidence, section 165. See, also, *Harrison v. Charlton*, 42 Iowa, 573; *Fell v. Railroad Co.*, 43 Iowa, 177.

Dean occupied a room in the defendants' home, and the defendants asked an instruction to the effect that if the stolen shingles were found in his room, in his possession, then they were not in the possession of the defendants. This instruction was refused, and the ruling is said to be error. It was not error to refuse the request. It was

3. SAME: evidence of absent witness: how proven.

4. SAME: concealment of stolen property: possession.

not necessary to show that the stolen property was ever in the possession of the defendants. It was enough to show that they know that it was stolen, and that they, by some means, aided in concealing it. *State v. St. Clair*, 17 Iowa, 149. And there was abundant evidence of that fact. The evidence, in fact, showed that the shingles were stolen and put in Dean's room upon the defendants' request, and when they were discovered by the aid of a search warrant both defendants stated that they had bought them. We have read the evidence in this case with care, and think it sufficiently supports the verdict and judgment. There is no error demanding a reversal of the judgment, and it is therefore, *affirmed*.

WEAVER, J. (dissenting).—The admission of testimony as to matters formerly sworn to by the absent witness is clearly erroneous, and should work a reversal.

EVANS, J., joins in the dissent.

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MAJESTIC THEATER COMPANY and others, Appellants, v.  
THE CITY OF CEDAR RAPIDS, M. J. MILES, and others,  
Appellees.

**Municipal corporations: PASSAGE OF ORDINANCES: INJUNCTION.** The court will not interfere by injunction to prohibit the passage of a municipal ordinance, even though alleged to be unconstitutional and void; but it may and will prevent the enforcement of an existing ordinance upon a showing that otherwise irreparable injury would follow. Thus the passage of an ordinance prohibiting and punishing the running of Sunday theaters, in its nature an exercise of police power, will not be enjoined; for if void for any reason the courts will not enforce it, and no irreparable injury could follow its passage.

*Appeal from Linn District Court.*—HON. W. N. TREICHLER, Judge.

WEDNESDAY, NOVEMBER 15, 1911.

THE opinion states the nature of the case and the material facts.—*Affirmed.*

*Grimm & Trewin* and *P. W. Tourtellot*, for appellants.

*Redmond & Stewart*, *Wm. Chamberlain*, and *F. C. Byers*, for appellees.

WEAVER, J.—The plaintiffs appeal from a ruling of the district court, sustaining defendants' demurrer to their petition and entering judgment against them for costs.

Stated as briefly as possible, plaintiffs allege that they are severally proprietors of theaters doing business in Cedar Rapids, and that the defendants are, respectively, the mayor, the clerk, and members of the city council of said city. They further allege that there has been introduced in said council and offered for enactment a proposed ordinance, making it unlawful for any person or persons to give, manage, or conduct any public theater, theatrical exhibition, vaudeville entertainment, or moving picture show, or to engage in the performance thereof, on the first day of the week, commonly called Sunday, and providing that violation of such ordinance shall be punished by fine not exceeding \$100 and costs, or by imprisonment on default in payment of such fine. This ordinance plaintiffs allege the city council intends to enact, and the mayor intends to approve and publish it when passed; and they further aver that, if so enacted, it will be void and of no effect, in that such legislation will be in violation of section 6 of article 1, of the Constitution of Iowa, forbidding discrimination between classes of persons, and further, will be in violation of the fourteenth amendment to the Constitution of the United States, in that it abridges the privileges of the citizens of the United

States, and its enforcement would work a deprivation of liberty and property without due process of law, and a denial to plaintiffs of the equal protection of the laws.

Plaintiffs further allege that the ordinance, if enacted, will be in conflict with the statutes of the state. They further say that, while the statute gives cities power to regulate the conduct of theaters and other places of amusement, it does not provide, nor was it intended to authorize the closing of such business on any day of the week. They still further contend that the state itself is without authority to empower the city to prohibit theaters, in that such an act would be an unjust and unreasonable interference with the personal liberty of the plaintiffs, and deprive them of liberty and property without due process of law, contrary to the provisions of section 1, article 1, of the Constitution of the state, and of the fourteenth amendment to the Constitution of the United States. Finally, plaintiffs say that the exhibitions given by them are neither obscene, indecent, or immoral, and the enforcement of such ordinance will operate to their great injury, for redress of which they have no plain, speedy, and adequate remedy at law, and they therefore pray that defendants may be enjoined from passing or enacting such ordinance; that the mayor be enjoined and restrained from approving or signing the same, if passed, and the clerk be likewise restrained from attesting or authenticating it.

To this petition, the defendants demurred generally, and the demurrer being sustained they appeal.

If we correctly apprehend the position of counsel for appellants, it is that the ordinance pending before the city council would be void and of no legal force or effect if passed, and for this reason it is sought to enjoin its passage. In other words, the court is asked to sit in judgment upon a matter of proposed legislation in advance of its enactment, and by its injunction to interrupt the city's exercise of its legislative functions. In this country, where

the independence of the legislative and judicial branches of government has been preserved by constitutional guaranties, it would seem hardly necessary to argue the erroneous character of such proposition; but counsel, while conceding the general rule to be that courts will not interfere with the proceedings of a legislative body, contend very earnestly that the rule is subject to exceptions, and that the case before us presents one of them.

It is first said that, if a proposed ordinance would be void as an *ultra vires* enactment, then its passage by the city council may be enjoined. No authority cited recognizes or sustains the rule as thus broadly stated. Indeed, it may be said that the courts will, under no circumstances, attempt to enjoin the exercise of the strictly legislative functions of a city council. This is something more than a rule established by precedent. It is a constitutional limitation of judicial power.

The authorities relied upon establish no exception to this statement. True there are cases in which the enforcement of a void ordinance may be enjoined, but that is an altogether different proposition. The law upon this subject is well stated by an eminent writer as follows: "It is unquestionably true that purely legislative acts, such as the passage of resolutions or the adoption of ordinances by a municipal body, even though alleged to be unconstitutional and void, will not be enjoined, since it is not the province of a court of equity to interfere in the proceedings of municipal bodies within their jurisdiction, or to control the exercise of their discretion. A distinction, however, is properly drawn between restraining an illegal act, attempted under the authority and sanction of a municipal body, and restraining the corporation itself from granting such authority. And, while courts will not enjoin municipal bodies from the passage of ordinances or resolutions, the courts may and will, on a proper case being shown, prevent their enforcement, and for this pur-

pose may enjoin proceedings thereunder which would otherwise result in irreparable injury." High on Injunction (4th Ed.), section 1243; *Gas Co. v. Des Moines*, 44 Iowa, 505; *Gas Co. v. City*, 87 Ala. 245 (6 South. 113, 4 L. R. A. 616).

But even this remedy will not be available, unless it appear that the party complaining has no adequate protection or redress at law. See authorities above cited. There is no such threat of irreparable injury in the attempted enforcement of a void ordinance, which is in the nature of a mere police regulation, for its invalidity is a perfect defense to any prosecution for its violation. *West v. City*, 10 Paige (N. Y.) 539; *Poyer v. Des Plaines*, 123 Ill. 111 (13 N. E. 819, 5 Am. St. Rep. 494); *Burnett v. Craig*, 30 Ala. 135 (68 Am. Dec. 115); *Alpers v. San Francisco* (C. C.) 32 Fed. 503.

It should be noted, however, in this connection, that a city or town, organized under the laws of the state, has a twofold character. It is not only endowed with certain purely legislative functions, by virtue of which it enacts police regulations and other general rules, by which the peace, good order, convenience, comfort, and prosperity of its inhabitants are sought to be conserved or promoted, but it is also charged with other powers, which are administrative, rather than legislative, and still others, more or less analogous to those of a private or business corporation, by which it makes contracts, constructs improvements, and performs many acts which, directly or indirectly, affect personal and property rights. Where legislation of the first-mentioned kind is pending before the council, the court will not, as we have already said, interfere with its passage, or undertake to adjudicate its validity in advance of its passage. But, where the council, in the exercise of its administrative or business functions, undertakes *ultra vires*, or in violation of the city's contract obligations, the enactment of an ordinance, by the very passage

of which, as distinguished from its enforcement, irreparable injury will be done to the complaining party, interference by injunction with such proceedings is sometimes allowable. *Poppleton v. Moores*, 62 Neb. 851 (88 N. W. 128); *Whitney v. New York*, 28 Barb. (N. Y.) 233; *Lewis v. Waterworks*, 19 Colo. 236 (34 Pac. 993, 41 Am. St. Rep. 248); *State v. Superior Court*, 105 Wis. 671 (81 N. W. 1046, 48 L. R. A. 819); *Waterworks v. New Orleans*, 164 U. S. 471 (17 Sup. Ct. 161, 41 L. Ed. 518); *Railway Co. v. South Orange*, 58 N. J. Eq. 83 (43 Atl. 53).

The proposed ordinance in the present case is clearly in the nature of a police regulation. If it be passed, and is a valid exercise of municipal power, then it is the duty of the plaintiffs to obey it, even though its enforcement tends to reduce the profits of their business. If it be void for unreasonableness, or is not within the power delegated to the city, or because the statute conferring the authority is itself unconstitutional, as counsel argue, then the courts will not enforce it, and no one can suffer irreparable injury therefrom. Such being its nature, it follows from what we have already said that this action can not be sustained, and the trial court did not err in sustaining the demurrer to the petition, or in dissolving the temporary injunction.

This conclusion renders it unnecessary for us to discuss the constitutional questions raised in behalf of the appellants, or to define the scope and extent of the authority which the statute (Code 1897, section 703) gives to cities "to regulate, license or prohibit theatrical exhibitions," or to decide whether this delegation of power implies authority to provide penalties for violation of the regulations or prohibitions so enacted. Whatever may be the final holding in these respects, the plaintiffs will find ample protection at law.

The judgment and rulings of the district court are therefore *affirmed*.

**B. F. WICKWIRE, Trustee for CHARLES F. W. BUENTE,**  
**Appellee, v. WEBSTER CITY SAVINGS BANK, Appellant.**

**Bankruptcy: PREFERENCES: PAYMENT BY ANOTHER.** Where an alleged  
1 insolvent gave a chattel mortgage to secure a debt and after-  
wards sold the mortgaged property subject to the mortgage,  
the fact that the purchaser instead of the insolvent paid the  
mortgage, was immaterial on the question of whether the pay-  
ment constituted a preference.

**Same: INTENT: INSTRUCTION.** Where the question of intent with  
2 which a particular act was done is involved, whether arising in  
a criminal or civil action, an instruction defining intent is proper:  
As where the question is whether an insolvent intended to create  
a preference by securing one of his creditors.

**Same: INSTRUCTIONS: DEFINITION OF WORDS.** Definition of the word  
3 "preference" as used in an instruction regarding preference of  
creditors in bankruptcy is not required, in the absence of a re-  
quest therefor.

**Bankruptcy: PREFERENCES: INTENT OF PARTIES: EVIDENCE.** The ver-  
4 dict of a jury in a cause properly tried and submitted will not  
be set aside if there is any substantial evidence in its support.  
In this action by a trustee in bankruptcy to recover a claimed  
preference the evidence is held sufficient to require submission  
of the issue and to support a finding of insolvency at the time  
the bankrupt executed a mortgage alleged to constitute the pref-  
erence; that he intended thereby to give a preference, and that  
the mortgagee intended to secure his claim to the exclusion of  
other creditors.

*Appeal from Hamilton District Court—HON. R. M.*  
*WRIGHT, Judge,*

WEDNESDAY, NOVEMBER 15, 1911.

ACTION at law to recover an amount paid to the de-  
fendant by Chas. F. W. Buente, an alleged bankrupt,  
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upon a chattel mortgage indebtedness of the said Buente, which chattel mortgage is said to have been received by defendant as a preference under the national bankruptcy law, and therefore void. Trial to a jury, verdict and judgment for plaintiff, and defendant appeals.—*Affirmed.*

*Boeye & Henderson*, for appellant.

*Wesley Martin and G. D. Thompson*, for appellee.

DEEMER, J.—Chas. F. W. Buente was engaged in the general merchandising business at Webster City, Iowa, for five or six years prior to August 6, 1908. During the latter part of this time, he did his banking business with the defendant. Something over a year before the transaction hereafter referred to, he borrowed of defendant \$400, and gave his note therefor. This note was due in ninety days, and was renewed five or more times for ninety-day periods until May 6, 1908, when the last note in the series was executed. This note was for \$400, and matured August 6, 1908. On July 31, 1908, Buente gave his wife a bill of sale covering his entire stock of goods for an expressed consideration of \$1,000. It is claimed that this bill of sale was in fact a mortgage to secure an indebtedness due the wife. This bill of sale was filed for record on the day of its execution. Learning of this bill of sale, the officers of the defendant went to Buente and demanded security for its note, and on August 1 he (Buente) and his wife executed a chattel mortgage to the bank, covering the entire stock of goods, to secure the \$400 note. This mortgage was filed for record on the day of its execution. On August 6, 1908, Buente traded his stock of goods to one Whitham for some Wisconsin land, and executed a bill of sale to Whitham for the goods, which bill of sale was subject to the bank's mortgage. As a matter of fact, Whitham, as part consideration for the exchange, undertook to pay

the bank's mortgage, and he in fact paid the indebtedness secured thereby on the day the trade was finally consummated, to wit August 6, 1908. The bank official who took the mortgage from Buente died before this case was reached for trial, and his testimony was not taken. On September 8, 1908, the creditors of Buente filed a petition, alleging that he was a bankrupt, and asked that he be so adjudged. To this Buente appeared and consented to an order so finding, and in October of the same year he was duly adjudged a bankrupt. This action was brought by the trustee in bankruptcy to secure judgment for the amount paid the defendant by Whitham, on the theory that Buente had made the defendant a preferential creditor within four months immediately preceding the adjudication of bankruptcy, and that the amount received by the defendant should be returned to the trustee. The case was tried to a jury upon issues duly joined, resulting in a verdict for plaintiff. Judgment was rendered thereon, and the appeal is from this judgment.

1. Several of the instructions are challenged, and error is predicated upon the ruling denying defendant's motion for a new trial, which challenges the sufficiency of the testimony to support the verdict. The theory on which the case was tried can best be stated by quoting a few of the instructions. These are as follows:

(3) Under the issues thus joined, the burden of proof is on the plaintiff to prove by a preponderance of the evidence each of the following propositions: First. That at the time of the making of the mortgage to the defendant, and the payment of the \$400 to the defendant, said C. W. F. Buente was insolvent. Second. That after the making of the said mortgage and the payment of the said \$400, and within four months thereafter, a petition in bankruptcy was filed against the said C. W. F. Buente. Third. That since the filing of the said petition the said Buente has been adjudged a bankrupt, and that there are outstanding creditors of his whose claims have been al-

lowed, but are still unpaid. Fourth. That, at the time of the making of the said mortgage and the payment of the said \$400, the said Buente intended to give to the defendant a preference over his other creditors, and that the said defendant at said time knew, or had reasonable cause to believe, that said Buente was in fact insolvent, and intended a preference.

(4) In the bankruptcy act, it is provided that if a bankrupt shall have given a preference within four months before the filing of the petition, or after the filing of the petition, and before the adjudication, and the person receiving it, or to be benefited thereby, or his agent acting therein, shall have reasonable cause to believe that it was intended thereby to give a preference, it shall be voidable by the trustee, and he may recover the property or its value from such person.

By reference to the above and foregoing language in this instruction contained, you will see that one of the important things for you to decide in this case is this: Whether the defendant bank knew or had reasonable cause to believe that the said Buente was insolvent, and that it was intended by him in giving the said mortgage to it (the said bank), and in causing the payment to it of the \$400, to give to the said bank a preference over his other creditors. It is not sufficient for the plaintiff to prove that the defendant bank had reasonable cause to suspect that Buente was insolvent and was preferring it over his other creditors; it (the said bank) must either have known, or have had reasonable cause to believe, that Buente was insolvent, and that it was receiving from him a preference over his other creditors. In still other words, it would not be enough for the bank to have had some reason to suspect the insolvency of the said Buente, but it must have had such a knowledge of the facts as to induce in it a reasonable belief of Buente's insolvency, in order to invalidate the mortgage taken by it to secure his debt to it (the said bank).

(5) In the course of these instructions, the term 'insolvency' has been several times used. Now, a person is said to be insolvent within the meaning of the law, in such cases as the one now before you, when the fair, rea-

sonable, market value of his property which is not exempt from execution is less than the amount of his indebtedness.

(7) If, at the time the defendant took from Buente said mortgage, it either knew of the insolvency of the said Buente, if he was insolvent, or had reasonable cause to believe that he was insolvent, and that he intended to give the defendant a preference over other creditors, the defendant can not now insist on such preference as against the plaintiff in this suit.

None of these are challenged, save it is insisted that there is no testimony in the record to show that Buente was insolvent when he made the mortgage to the bank. They must therefore be treated as the law of the case.

The instructions complained of are six and seven and one-half, which read as follows:

(6) If you find from the evidence that at the time the bill of sale was made by Buente to Whitham the same was made subject to the \$400 mortgage, and that it was the intention of Buente and Whitham that said mortgage should be paid by Whitham as a part of the consideration for which the said bill of sale was made, and you further find that payment of the said \$400 was in fact made in pursuance of the said intention, said payment, though made by Whitham will have the same legal effect as if it has been paid personally by Buente.

(7½) In the course of these instructions, the words 'intended' and 'intention' have been several times used. Now, the intent with which an act is done, being the purpose or formulated design in the mind at the time the act is being done, is often incapable of direct proof; but its existence or nonexistence may frequently be ascertained by the jury from just and reasonable inference from all the facts proved. Thus you are instructed that you have in law a right to infer that a man intends to do that which he voluntarily does do, and that he intends all the natural, direct, and probable consequences of his own acts. Thus, in the case before you, if Buente, at the time of the making of the mortgage, was insolvent, and knew that he was insolvent, and nevertheless executed a mortgage to the bank, which act necessarily operated in giving a

preference to the said bank, you would have a right to infer that he intended by giving the said mortgage to give said bank a preference.

Counsel say, with reference to the sixth, that they can find no authorities which condemn such an instruction, but that on principle it must be erroneous, for the reason that the payment to defendant was not made by Buente, but by Whitham, and therefore there should not be any recovery from defendant. We are not disposed to adopt this line of reasoning. The debt was Buente's, and, although Whitham actually paid the money to the bank, it was Buente's debt, and he at all times was the principal in the transaction. The money came into defendant's hands from Whitham by reason of the Buente chattel mortgage, and this mortgage is charged to be invalid because preferential in character. But for the mortgage defendant would not have received the money, and the payment was in fact made for Buente, to satisfy the note which the mortgage was made to secure. Defendant received the money as in payment of the note, and surrendered the same to Whitham. The payment was in fact made for Buente, and the mere fact that Whitham actually turned over the money is not controlling. The instruction seems to be correct.

1. BANKRUPTCY:  
preferences:  
payment by  
another.

Number seven and one-half, also complained of, undoubtedly announces elementary propositions of law. The chief point made in argument is that such an instruction has no place in civil procedure, and is applicable only to criminal cases, where intent, motive, and purpose are involved. As we view it, the instruction announces a general rule of law, applicable to any case where motive, purpose, and intent are involved, no matter whether the action be criminal or civil in character. One of the issues in the case was whether or not Buente intended to give defendant a preference. In order to determine that issue, his acts and conduct, as well as

2. SAME: intent:  
instruction.

his declarations, of necessity, had to be considered, for these are the things indicative of intent, which, after all, is a state of mind that can only be shown by what one says and does. Logically and according to the rules of law, it follows as a general proposition that intent is to be inferred from what one does, and the presumption obtains that one intends all the consequences which directly and naturally flow from what he does. The instruction is correct, and it found proper place in the charge as given.

Complaint is made because the court used the word "preference" in its instructions, without defining the term in any part of the charge. In this there was no error.

Defendant asked no instruction upon the subject, and definition of the term was not required, in the absence of a request. The instructions as a whole fairly covered the issues, and we see no error.

II. The chief complaint of counsel is that there is no testimony tending to show Buente's insolvency when he made the mortgage, no testimony that any of defendant's

officers knew of such insolvent condition, even if it existed, and no evidence showing or tending to show that they, or any of them, had reason to believe that Buente was insolvent, or was intending to give them a preference. The case was tried to a jury, and if there be any substantial testimony in support of these various issues we are not justified in interfering, no matter what our conclusions might be, were we to settle the facts. As will be observed from the instructions already quoted, the court defined insolvency, and as this definition is not complained of we shall assume it to be correct.

The inquiry then is this: Is there any substantial testimony showing or tending to show that Buente's assets, at a fair and reasonable valuation, were at the time the mortgage was made less than his outstanding indebtedness?

3. SAME: instructions: definition of words.

4. BANKRUPTCY: preferences: intent of parties: evidence.

Without setting forth the testimony *in extenso*, it is enough to say that a jury was justified in finding therefrom that Buente's liabilities were in excess of his assets, even if we treat the bill of sale to the wife as a mortgage, and not an absolute sale. There is a conflict in the testimony upon this proposition, but such conflict, even though to our minds it be such that a preponderance of the testimony favors defendant's contention, is not enough to justify us in setting aside the verdict. According to the testimony, Buente, at the time of the giving of the mortgage, was indebted to an amount exceeding \$3,600, and a jury may have found that his assets did not amount to more than \$2,700 or \$2,800. Moreover, he was found insolvent within sixty days from the time he made the mortgage, and his creditors commenced action to have him declared a bankrupt within thirty-eight days after the mortgage was executed. Again, his deposits with the defendant bank had fallen off to a noticeable extent before the bank took its mortgage, and his creditors were then pressing him. For some reason, he gave a bill of sale to his wife, covering his entire stock, as he now says, as security to his wife. Even if that were the purpose, the fact that such a conveyance was made is indicative of a feeling on his part that he was so much involved that to protect his wife it was necessary to give her security, else she might lose her claim. Furthermore, the trade to Whitham was peculiar. Buente never saw Whitham's Wisconsin land, and no invoice of Buente's stock of goods was taken. Buente made no inquiry as to the value of the land, and Whitham had no reliable information as to the stock. The trade was made on the very day it was suggested, and without the usual investigations. Other creditors were pressing Buente for payment close to the time the mortgage was made, and one of these was satisfied by the defendant bank; another was offered forty cents on the dollar by Buente. Surely there was enough upon this proposition to carry the

case to a jury. Upon the question of defendant's officers' and agents' knowledge of Buente's insolvency when they took the mortgage, the case is not perhaps so clear. As already stated, the official who actually took the mortgage is dead, and we do not have his testimony. It is shown, however, that the bank officials noticed a marked falling off of Buente's deposits during the months of June and July of the year 1908; that he had overdrawn his account in the bank; that his account was unsatisfactory; and that the officials were worried over the situation. The making of the bill of sale was known to the bank, and the next morning one of the officials went to Buente with a demand for security of the bank note. It was suggested that the making of this bill of sale would stimulate all Buente's creditors into activity. Buente testified that the bank had been kind to him, and that he told the official who came for security that he appreciated this kindness, and would take care of the bank. Before this, a creditor of Buente was pressing him for payment of his claim, and this claim was taken care of by the bank giving a check for a part of the claim directly to this creditor. This must have been in settlement of the entire claim, for it was not listed among Buente's liabilities. The bank official knew, of course, of the bill of sale to the wife, which in itself was suggestive of insolvency, and perhaps of an intent to defraud. If intended as security merely for \$1,000, there is no reason why a mortgage should not have been executed, instead of an absolute bill of sale. The bank knew of other claims against Buente, and a jury was justified in finding that the bank knew or should, in the exercise of ordinary care, have known of Buente's insolvency. See *Bank v. Jewelry Co.*, 123 Iowa, 432; *Coleman v. Decatur Egg Case Co.*, 186 Fed. 136 (108 C. C. A. 248); *Boudinot v. Hamann*, 117 Iowa, 23; *Jackman v. Bank*, 125 Wis. 465 (104 N. W. 98, 115 Am. St. Rep. 955); *Grant v. Dry Goods Co.*, 23 S. D. 195 (121

N. W. 95). That the bank intended to secure itself to the exclusion of other creditors is a fair inference from the testimony. *Grant v. Dry Goods Co., supra; Ferguson v. Lederer Co.*, 128 Iowa, 286.

It affirmatively appears that the bank official who took the mortgage made no inquiry of Buente as to his financial condition, and that the making of the bill of sale was the immediate cause for demanding security of the bank indebtedness. That these facts and circumstances were enough to take the case to a jury, see *Coleman v. Decatur Egg Case Co., supra; Ferguson v. Lederer Co., supra*. Appellant predicates its entire case upon *Burnham v. Ft. Dodge Grocery Co.*, 144 Iowa, 577. The opinion in that case supports the charge as given by the trial court, and, although the decision was against the claim of preference, the action was in equity, and we were there compelled to find the very truth; whereas in this case the only proposition involved is, Was there enough testimony to take the case to a jury?

We find no error in the record, and the judgment is affirmed.

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THERON W. PRINDLE, Appellee, v. IOWA SOLDIERS ORPHANS HOME, THE STATE OF IOWA, ex rel., BOARD OF CONTROL, et al., and AMANDA WILSON, Intervener, Appellants.

**Conveyances:** TESTAMENTARY DISPOSITION OF PROPERTY. Where a deed  
1 conveys to the grantee the property itself, the interest so created, whether it be in fee or merely a life estate contingent upon the death of the grantors, begins with the making and delivery of the instrument and not from the death of the grantor; and is not testamentary in character although possession may be postponed until the death of the grantor.

**Same:** CONSTRUCTION: REPUGNANCY. Where the granting clause in  
2 a deed creates an estate of inheritance there may be a reservation of a life estate consistent therewith; but when the grantors attempt still further to cut down the estate of the grantee to a

contingent right to use and occupy the property for life, after the expiration of the reserved life estate in the grantors, such a provision becomes entirely repugnant to the grant in fee and cannot be given effect.

**Same: REMAINDERS: PARTIES.** Where the granting clause, as in this instance, made no mention of a charitable institution but conveyed the property to the grantee and his heirs, a subsequent provision in the habendum clause for a remainder over to the institution is invalid, it not being a party to the instrument.

*Appeal from Hardin District Court.*—HON. R. M. WRIGHT, Judge.

FRIDAY, NOVEMBER 17, 1911.

*Ward & Williams*, for appellant intervener.

*Geo. W. Cosson*, Attorney-General, and *C. L. Hays*, for other appellants.—*Affirmed.*

*Lundy & Wood*, for appellee.

WEAVER, J.—On June 15, 1901, Helen Atkins, widow, and Eliza J. Leigh, widow, being the owners of certain lots in the town of Steamboat Rock, Iowa, executed and delivered a conveyance thereof to Theron W. Prindle, plaintiff herein, who is the son of the last-named grantor. The granting clause of this deed runs “to Theron W. Prindle, his heirs and assigns,” and the instrument contains the usual covenants of warranty. Following the description of the property are the words:

For the term of his natural life, subject, however, to a life estate therein expressly reserved to the grantors herein and to the survivors of said grantors, so long as either may live. In case of the death of said T. W. Prindle, his wife, Margaret Prindle, shall have the right to continue to occupy and use said premises, so long as she shall live and remain his widow, after grantors' death.

Upon the death of grantors herein and of grantees herein, or of a termination of their interests in said premises, the remainder of the title shall vest in the heirs of their body, the fruit of their marriage, if any shall be living. In case of the termination of the estates above granted by the death of the grantors and of T. W. Prindle and of Margaret Prindle, his wife, or of their dying childless, or its termination otherwise, then the remainder of the title to said premises shall vest in the Orphans' Home and Home for Destitute Children, located at Davenport, Iowa, to be used and appropriated by the trustees in charge thereof for its support. The holders of any intermediate estate shall keep the taxes thereon paid during the time of their tenancy.

The grantor, Eliza Jane Leigh, died intestate, November 22, 1905, leaving the said Theron W. Prindle, Amanda Wilson, and three other children, her only surviving heirs. On September 17, 1907, Helen Atkins, the other grantor in the conveyance above mentioned, quitclaimed the same property to the plaintiff, subject to her own life use, and declaring therein her intention to pass to the grantee "present interest" in the property. On February 18, 1908, the plaintiff, claiming under the conveyances to which we have referred, instituted this action in equity, asking that the title to said property be quieted in him as the absolute and unqualified owner thereof in fee.

Of the defendants named therein, none appear to contest the claim thus asserted, except the state, which is represented by counsel, who contend that the first-named deed creates a contingent or executory interest in the state, for the benefit of the orphans' home, which it maintains at the city of Davenport. Amanda Wilson, sister of plaintiff, intervenes, claiming that the said deed made by her mother, Eliza Jane Leigh, was testamentary in character; and therefore did not convey to or create in the plaintiff any present estate or interest, and not being witnessed as a will it is ineffective for any purpose.

The trial court found against the claims of the state, and dismissed the intervention of Mrs. Wilson and entered a decree, granting the relief asked by the plaintiff. The state and the intervener appeal.

The nature of the estate conveyed by the first-mentioned deed is of course the vital question presented by this appeal. That the grant to the plaintiff is not merely

1. CONVEYANCES: an imperfect or incomplete testamentary instrument we think is very clear. The grantors do not attempt or profess to create an

estate or interest which shall vest only upon their death. On the contrary, the deed in apt terms conveys the property itself to the grantee, and the interest so created, whether it be a fee or merely a life estate contingent upon the death of the grantors during his lifetime, begins with and dates from the making and delivery of that instrument, and not from the death of the grantors, though his right to the possession is postponed until that event. It follows that, in our judgment, the petition of intervention was properly dismissed. See 9 Am. & Eng. Ency. (2d Ed.) page 92, note 5.

As between the other parties to the controversy, we have next to inquire whether the deed conveys the fee or a life estate only, with a contingent or executory interest over to the state for the use of the orphans'

2. SAME: construction: repugnancy. home. It will be observed from our statement of the case that the portion of the deed

which is technically termed the "premises," and includes the granting clause and the description of the property, is in form and substance an ordinary conveyance of the fee, in that it expressly grants the property described to the plaintiff and his heirs and assigns, while the *habendum* which follows seems to limit the estate so created to a life use contingent upon the death of both grantors during the lifetime of the grantee. That these provisions are essentially repugnant is apparent. If the premises are to be

given full effect as a grant to plaintiff, his heirs and assigns, it must be held to convey a fee, and not a mere life estate, dependent upon another intervening life estate. On the other hand, if the *habendum* be given effect to limit the interest conveyed to an estate for life, after the expiration of a similar estate, reserved in the grantors, then nothing is conveyed to the plaintiff "and his heirs." When premises and *habendum* are irreconcilably repugnant, it is the universal rule that the former must prevail. The one purports in express words to grant an estate of inheritance, while the other is limited to the life of the grantee. It is true that the tendency of modern decisions is to restrict the application of this rule to cases where the deed is susceptible to no reasonable construction which will give the apparent intended effect to both clauses; but if the repugnancy be so radical that one provision must be ignored the *habendum* must yield. *Beedy v. Finney*, 118 Iowa, 276.

It will be conceded that, if the premises or granting clause does not in any way define or limit the estate conveyed, or if the grant is in general terms only, from which, in the absence of other words, an estate in fee is to be inferred, the *habendum* may be given effect to qualify, restrict, or enlarge the estate and effectuate the intent of the grantor, as derived from a reading of the entire instrument. *Beedy v. Finney, supra*; *Whetstone v. Hunt*, 78 Ark. 230 (93 S. W. 50); 8 Am. & Eng. Ann. Cas. 443.

But cases not infrequently arise which are not to be thus easily disposed of. As we have already noted, the deed we have now to construe undertakes in express words to create an estate of inheritance in Theron W. Prindle. It is made to him "and his heirs." The word "heirs," as here used, is a technical term, and denotes the creation of a heritable estate. The reservation of a life estate in the grantors is not repugnant thereto, and may be given effect; but the attempt in the subsequent clause to cut down

the estate of the grantee to a contingent right to use and occupy the property for life, after the expiration of the reserved life estate in the grantors, is not open to any construction in harmony with the existence of an estate of inheritance in the plaintiff. *Smith v. Smith*, 71 Mich. 633 (40 N. W. 21); *Ball v. Foreman*, 37 Ohio St. 132; *Tyler v. Moore*, 42 Pa. 374; *Breitenbach v. Dungan*, 5 Clark (Pa.) 236; *Hafner v. Irwin*, 20 N. C. 570 (34 Am. Dec. 390); *Canal Co. v. Hewitt*, 55 Wis. 96 (12 N. W. 382, 42 Am. Rep. 701); *Lamb v. Medsker*, 35 Ind. App. 662 (74 N. E. 1012); *Chamberlain v. Runkle*, 28 Ind. App. 599 (63 N. E. 486); *Dunbar v. Aldrick*, 79 Miss. 698 (31 South. 341); *Blackwell v. Blackwell*, 124 N. C. 269 (32 S. E. 676); *Goodtitle v. Gibbs* (Eng.) 5 B. & C. 709; 3 Washb. Real Prop. (6th Ed.) section 2360. The citation of authorities to this effect could be greatly extended, but those we have mentioned sufficiently illustrate the rule.

In *Smith v. Smith*, *supra*, decided by the Michigan court, the point here discussed was directly involved. The deed there in question contained a grant to Thomas J. Smith "and to his heirs," followed by an *habendum* clause apparently restricting the interest conveyed to an estate for life. The court says, "The deed is in terms plainly contradictory. It can not be construed as an harmonious whole," and because of such repugnancy the attempt to cut down the estate conveyed was held inoperative. In his work on real property, above cited, Mr. Washburn says: "If there is a clear repugnance between the nature of the estate granted and that limited in the *habendum*, the latter yields to the former; but if they can be construed so as to stand together, by limiting the estate without contradicting the grant, the court always gives that construction in order to give the effect to both. If, therefore, a grant be to A. and to his heirs, *habendum* to him for years or for life, the restrictive clause is void." The same rule is

approved and applied in *Whetstone v. Hunt*, 78 Ark. 230 (93 S. W. 979).

There is still another reason why neither the state nor the orphans' home, in the interest of which the state appears, is in any position to contest the plaintiff's action. The conveyance under which plaintiff claims is to him alone. There is in the premises of the deed no mention whatever of the home; nor is any trust imposed upon the plaintiff in favor of that charity. The home and the state are strangers to the transaction. The only mention of the home is in an added clause, by which, after having granted the property to plaintiff and his heirs, and after an *habendum* in which they apparently attempt to restrict the interest conveyed to a life estate, they declare that, in the event of the death of plaintiff and his wife without issue, the title shall vest in the orphans' home. Had this instrument been insufficient to convey the fee to plaintiff, and it had been executed as provided by our statute on wills, this provision could perhaps be given a testamentary effect, in which event the home, or the state, as its trustee, could assert the rights of a contingent remainderman. As it is, the deed confers upon it no right which the courts will recognize or enforce. A case very similar in fact and principle is found in *McGarrigle v. Orphan Asylum*, 145 Cal. 694. There, as here, the owner of realty conveyed it to a family relative by a deed, the premises of which were sufficient to pass the fee, but in the *habendum* there was inserted a clause as follows: "It is the purpose of the party of the first part by this deed that after the death of the party of the second part the said described lands shall become and be the property of the Roman Catholic Girls' Orphan Asylum of San Francisco." Of the effect of this provision, the court says: "The trial court correctly construed this clause as containing no operative words of grant, and as failing to convey any present interest in the

3. SAME: remain-  
ders: partica.

property." The rule applied in this precedent is sound in principle, and has the support of the weight of authority. We are content to follow it. The trial court did not err in holding that the grant to the plaintiff was in no manner qualified or lessened by the grantors' attempt to control the disposition of the property after the grantees' death. The conclusions already announced make it unnecessary for us to consider or pass upon other legal propositions argued by counsel.

For reasons stated, the decree of the district court is *affirmed*.

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A. H. BLANK, Administrator, v. INDEPENDENT ICE COMPANY AND OTHERS, Defendants, and RAIMUND SEEBURGER, Intervener, Appellant.

**Landlord and tenant: FORFEITURE: WAIVER.** Provisions in a lease  
1 for reentry, to distrain for rent or to recover possession in case of default in payment of rent, and in a concurrent contract giving the lessee an optional right to purchase and that the option should cease upon a declaration of forfeiture of the lease are not self-executing, but some affirmative action on the part of the landlord is necessary to create a forfeiture; but this right of forfeiture may be waived by subsequent acceptance of rent money and the assertion of a lien for accruing rent, under the rule that one having two inconsistent modes of redress is bound by his deliberate choice of one.

**Receivers: SALE OF OPTION CONTRACT.** An optional contract for the  
2 purchase of real estate which is of value may be sold and assigned by order of court for the benefit of the creditors of an insolvent estate, although it may not ordinarily be sold by the party to whom it was originally given: So that in this receivership proceeding the court had power to order the sale of an option to purchase property made in connection with a lease of the same by the insolvent.

*Appeal from Polk District Court.*—HON. JAMES A. HOWE,  
Judge.

approved and applied  
(93 S. W. 979).

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premises to second party upon the terms specified in written lease executed between them of this date, and which reference is here made and which lease is made of this contract and which lease is drawn for a term of two years from and after this 20th day of February, 1909. Now, therefore, it is expressly agreed and understood by the parties hereto that in consideration of the terms of said lease and the further agreements in this contract, said second party shall have the said two years' option provided for in said lease in which to exercise their option to avail themselves of the agreements in this option contract. And in the event that second party should, by failure to perform the agreements of said lease on its part, then and in that event their right to exercise said option shall thereupon cease and determine, upon the expiration of forfeiture of said lease being made by first party.

The ice company took possession under the lease and erected buildings on the property, but did not pay the rent on the 1st of March until in June, and never, in fact, paid any rent thereafter. The company owed a large amount, and on the 13th day of July, 1909, this action was commenced for the foreclosure of a mortgage upon its property. A receiver for its entire property was appointed on the same day and took immediate possession thereof, and continued the ice business under the orders and direction of the court. The receiver paid the rent accruing after his appointment, and it was accepted without protest by the intervenor. After the receiver had taken possession and on the 13th day of September, 1909, the landlord, intervened in the action then pending, that he was the owner of the property, and demanded of him therefor for the months of April, May, June, July, August, and September, and he asked that therefor be established as superior to the liens of mortgages. In his petition of intervention, Seeburger stated that he had made the lease and option contract, but made no claim therein that either had been for-

SATURDAY, NOVEMBER 18, 1911.

THE opinion states the case.—*Affirmed.*

*J. A. Merritt*, for appellant.

*Clinton L. Nourse*, for appellee.

SHERWIN, C. J.—The intervener, Seeburger, leased to the Independent Ice Company certain real property, and at the same time entered into a contract with the ice company, whereby the ice company was given an option to purchase said property for \$4,000, payable in installments of \$500 each. The lease was made on the 20th day of February, 1909, for a term of two years, and provided for the payment of rent on the 1st day of March following and monthly thereafter. It was also provided that if default should be made in any of its covenants by the tenant it should be lawful for the landlord "to re-enter the said premises or to distrain from said rent, or he may recover possession thereof by action of forcible entry and detainer, or he may use any or all of such remedies." And, further, that the tenant "will not sell, assign, underlet or relinquish the said premises without the written consent of the lessor under a penalty of a forfeiture of all its rights under this lease at the election of the party of the first part." "Lessor has entered into option contract with lessee of this date on said premises to which reference is here made and which is a part hereof." The contract, giving the option to buy the premises, contained the following provisions:

Second party (ice company) shall also annually pay all taxes and assessments that may accrue on said property as they become due, or before they become delinquent and including the last half of the taxes for the year 1908. Whereas said first party (Seeburger) has this day leased

said premises to second party upon the terms specified in the written lease executed between them of this date, and to which reference is here made and which lease is made a part of this contract and which lease is drawn for a term of two years from and after this 20th day of February, 1909: Now, therefore, it is expressly agreed and understood by the parties hereto that in consideration of the covenants of said lease and the further agreements in this contract, said second party shall have the said two years' time provided for in said lease in which to exercise their election to avail themselves of the agreements in this option contract. And in the event that second party should, by their failure to perform the agreements of said lease on their part, then and in that event their right to exercise said option shall thereupon cease and determine, upon the declaration of forfeiture of said lease being made by first party.

The ice company took possession under the lease and erected buildings on the property, but did not pay the rent due on the 1st of March until in June, and never, in fact, paid any rent thereafter. The company owed a large amount, and on the 13th day of July, 1909, this action was commenced for the foreclosure of a mortgage upon its property. A receiver for its entire property was appointed on the same day and took immediate possession thereof, and continued the ice business under the orders and direction of the court. The receiver paid the rent accruing after his appointment, and it was accepted without protest by the intervener. After the receiver had taken possession of the property, and on the 13th day of September, 1909, Seeburger, the landlord, intervened in the action then pending, alleging that he was the owner of the property, and that rent was due him therefor for the months of April, May, June, July, August, and September, and he asked that his lien therefor be established as superior to the liens of the mortgages. In his petition of intervention, Seeburger alleged that he had made the lease and option contract, but he made no claim therein that either had been for-

feited. As a matter of fact, the receiver had paid Seeburger the rent for the last half of July and for August and September before the petition of intervention was filed, so that when he intervened he had received all rent that accrued after the receiver took possession, and the only rent due him was for the months of April, May, and June and the first half of July. On the 23d day of October, 1909, upon the application of the receiver, the court ordered him to advertise for sale and accept bids for the ice company's property. This was done, and on the 23d day of November the receiver reported to the court that he had accepted a bid for the general property, and said: "It is further understood and intended that the interest of the defendant in R. Seeburger's property at 15th and Walnut streets, in the city of Des Moines, was excepted from such sale and reserved for the further disposition of the court." On the following day the court entered an order, approving and confirming the sale, but specially excepting from such sale the interest of the defendant ice company in the R. Seeburger land contract for the sale of the real property, and reserving the said interest in the contract for the further disposition of the court. On the 3d of December, 1909, the receiver reported to the court, in a report sworn to on December 2d, that "the defendant ice company has an option to purchase real estate at Fifteenth and Walnut streets with R. Seeburger, and that your receiver has been offered by A. H. Blank the amount of \$250 for the said option or land contract, and your receiver respectfully states to the court that, in his judgment, the said amount of \$250 is a fair price for said option or contract, and your receiver would recommend that the same be accepted." On the 2d day of December, 1909, Seeburger filed an amendment to his petition of intervention, alleging that default had been made in the payment of rent, that he had given notice in writing, declaring the tenancy at an end, and withdrawing all claim for the rent of the month of

December and all months thereafter. On the 3d of December, Seeburger served upon the ice company and upon the receiver a notice, dated the day before, in which he declared that the lease for the real property was "forfeited and declared null and void from this date and the tenancy thereunder terminated," and also stating that, "I declare the one certain option contract executed on or about the same day by the undersigned R. Seeburger and said Independent Ice Company, which was made a part of the said contract lease for said property, forfeited, canceled, null, and void, according to the terms of said lease and option contract and all rights thereunder terminated."

December 4th the court heard the receiver's report, and found and ordered as follows: "The court finds from such receiver's report that there exists between defendant ice company and R. Seeburger a land contract or option for certain lots at Fifteenth and Walnut streets, in the city of Des Moines, Iowa, in which said ice company had an option or right to purchase said lots, and that A. H. Blank has offered the sum of \$250 for said option, and that the same is the fair and sufficient value thereof. The court hereby expressly authorizes, empowers, and directs the receiver to make conveyance or assignment to A. H. Blank of the option or land contract existing between R. Seeburger and the defendant ice company upon the payment to the receiver of the sum of \$250, the receiver to pay said rent or other charge as may exist against such contract or option at this date."

On the 6th day of December, 1909, the receiver assigned said option contract to A. H. Blank, and on the 8th and 14th of the month the receiver tendered to Seeburger, in writing, the first installment due on the option contract and also the rent due, both of which were refused. On the 31st day of December, the court approved and confirmed the sale and assignment of the option contract to the plaintiff, Blank. Thereafter the receiver answered the

petition of intervention of Seeburger, in which he pleaded the sale and assignment of the option contract to Blank, the tender of the money, and the refusal of Seeburger to receive the same, and alleged that he was ready and willing to pay said sums, or any other sums required, and praying that the intervener, Seeburger, be decreed to carry out the terms of the option contract. Thereafter the receiver amended his answer to the petition of intervention, pleading a waiver of the right to forfeit the lease and option contract. The purchaser, Blank, also intervened, adopting the answer of the receiver, and asking that his rights be protected. After trial, the court entered a decree, providing for the payment to Seeburger of the rents due him, and decreeing further that, upon the payment of the full consideration named in the option contract to Seeburger, or to the clerk of the court for his benefit, including all taxes, Seeburger convey to Blank the property in controversy. Seeburger appeals. The foregoing statement of the issues and of the various steps taken by the different parties in interest seems necessary to a correct understanding of the situation.

I. The provision in the lease that upon default in the payment of the rent the lessor might "re-enter," "distrain for rent," or recover possession, and the provision in the option contract, that said option should cease and determine upon the declaration of a forfeiture of said lease being made, were not self-acting, and neither operated to terminate the contract or lease in and of themselves alone. Affirmative action on the part of Seeburger was necessary to create a forfeiture, and such action he did not take until the 3d day of December, 1909. In the meantime, the ice company had been in possession about four months and a half, and had never paid more than one month's rent, and that was paid over three months after it was due and should have been paid. The receiver paid the rent accruing after he

1. LANDLORD AND  
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feiture: waiver.

took possession of the property, and this was received by Seeburger without protest and without any intimation that the lease was forfeited by its own terms, or that he was not willing to let it remain in full force. He accepted from the receiver the rent for the last half of July and for August and September, and in September filed his petition of intervention, asking that his lien for past-due and for future rents be established as a first lien upon the property of the ice company then in the hands of the receiver. This was an election on his part to treat the lease and option contract as in full force and effect, and to pursue his remedy to enforce his landlord's lien for rents due and to accrue. Between the time of the filing of Seeburger's petition of intervention and the 2d day of December, the receiver was attempting to realize something for the insolvent estate by the sale of the option contract. This was made manifest by the several reports of the receiver and by the orders of the court; and Seeburger, being a party to the litigation, is presumed to have known what was being done, yet, with that knowledge, he continued to claim a lien for accruing rents, and never made a claim adverse thereto, until he filed his amendment to his petition of intervention, on the 2d day of December, wherein he stated that he made no claim for the December rent or any rent thereafter; and in the meantime the receiver had contracted for the sale of the option contract. We think that Seeburger had already waived his right to forfeit the lease and contract, and that his declaration of December 3d came too late. *Hollis v. Insurance Company*, 65 Iowa, 454.

It is well settled that a man may not take contradictory positions, and where he has the choice of two modes of redress, and the two are so inconsistent that the assertion of the one involves the repudiation of the other, his deliberate choice of one, with knowledge of such facts as would entitle him to resort to either, will estop him from thereafter going back and electing again. *Seeley v. Seeley*

*Hdw. Co.*, 130 Iowa, 628; *Elevator Co. v. Railroad Co.*, 97 Iowa, 719.

II. As we view this case, the only serious question is whether the court had the power to order its receiver to sell the option contract. This court has held that a

2. RECEIVER: sale  
of option  
contract.

mere option to purchase real estate creates no interest in the land that is subject to execution. *Sweezy v. Jones*, 65 Iowa, 272.

And in *Myer v. Stone & Son*, 128 Iowa, 10, it was held that an option which was expressly limited to the party to whom it was given could not be assigned. There is also language in the opinion warranting the conclusion that no purely option contract can be voluntarily assigned. But there is a clear distinction between the voluntary assignment of such a contract and an assignment by the court for the purpose of protecting the creditors of an insolvent estate. In the *Myer* case, we said that the privilege of buying property at a certain price is often of much value, and this must be true; for, where land values are rapidly increasing the right to purchase at a given price within a specified time is often of great value. Many men in this state alone have made fortunes out of such options within the past few years. If an option has, in fact, a value, we see no sound reason why it may not be sold and assigned under order of the court for the benefit of the creditors of an insolvent estate, even though it may not ordinarily be assigned by the party to whom it was originally given. *Spinney v. Miller*, 114 Iowa, 210, was a case analogous to this. There a mortgage had been given which provided that it was nonnegotiable and noncollectible in the hands of others than the mortgagees. The plaintiff therein acquired title by assignment from the receiver of an insolvent estate, and we said: "Notwithstanding this provision, the instrument was transferable under our statutes (Code, section 3046), subject, of course, to any defenses that would have been good as against the assignor.

See, also, *Mershon v. Insurance Co.*, 34 Iowa, 87. Furthermore, it is universally held that a provision restraining the assignment of such an instrument is not operative against an assignment effected by law, or through an order of court. Where it is given force, it is restricted to voluntary alienation." 4 Kent's Commentaries, 128. It is also the general rule that courts of equity will give effect to assignments of future interests of every kind, as well as to assignments of choses in action. 2 Am. & Eng. Enc. of Law, 1010; *Trull v. Eastman*, 3 Metc. (Mass.) 121 (37 Am. Dec. 126); *Bacon v. Bonham*, 33 N. J. Eq. 614; 2 Story's Equity Jurisprudence (13th Ed.), section 1040. That the court had the power to authorize the assignment in question we do not doubt, and the judgment will therefore be *affirmed*.

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JOHN MURPHY, by JANE MURPHY, his Next Friend, Appellee, v. BETTENDORF METAL WHEEL COMPANY, Appellant.

**Master and servant: ASSUMPTION OF RISK.** An employee having no  
1 knowledge of the defective and dangerous character of a machine with which he is at work, and who is given no warning or instruction as to how to do his work, does not assume the risk of injury incident to a defect in the machine.

**Same: DUTY OF EMPLOYEE: CONTRIBUTORY NEGLIGENCE.** It is the duty  
2 of an employee to obey the orders of his master, and in so doing he may assume that he will not be directed to work in an unsafe place; and if injured in consequence of obeying an improper order he will not be guilty of contributory negligence as a matter of law, unless the dangers of the place were so obvious that no prudent person in a like situation would undertake it, even if so ordered. In the instant case plaintiff was injured by the accidental dropping of a defective hammer, and it is held that as his superior was in charge of the operation of the hammer and directed plaintiff to perform the work, the dangers of which he was not aware, he was not negligent as a matter of law.

*Appeal from Scott District Court.*—HON. D. V. JACKSON,  
Judge.

MONDAY, NOVEMBER 20, 1911.

ACTION at law to recover damages for injuries received by plaintiff while working with a drop hammer in one of defendant's shops. Trial to a jury. Verdict and judgment for plaintiff, and defendant appeals.—*Affirmed.*

*Cook & Balluff*, for appellant.

*L. E. Roddewig and W. M. Chamberlin*, for appellee.

DEEMER, J.—Plaintiff, a boy eighteen years of age at the time of the accident in question, was injured by having his hand caught under a trip hammer, while working with the same in the course of his employment. This trip hammer, or drop machine, was defective and out of repair, and occasionally, without any action on the part of the operator, would repeat; that is to say, the hammer would be lifted from the anvil upon which the material was to be shaped, and, without being thrown by the operator, would raise and lower itself by reason of defects in its construction. Plaintiff was set to work with this machine without any knowledge of its defects; nor did he acquire any knowledge thereof while working with the machine before he received his injuries. He was ordered by defendant to go to work with the machine, assisting one Wilkins, who had control of and was the operator of the machine. The hammer was used for shaping cleats and yokes, which were worked hot and handled with tongs, and for straightening hubs, which were worked cold and put in and taken out by hand. These hubs weighed from ten to fifteen pounds each. Wilkins was the operator and plaintiff, Murphy, was a helper, who worked at the back

of the machine, under Wilkins' directions. Except when working upon hubs, there was no occasion for anyone to put his hands under the hammer, but when hubs were straightened it was necessary to manipulate them by hand. When the foreman directed plaintiff to work with the machine, he said that Wilkins would tell him what to do. Plaintiff had worked for the defendant about different machines for about four years before he was hurt, and about three years before the accident he worked for a month or two with the machine in question in making cleats. According to his testimony, he had worked with this machine in straightening hubs all told about three or four days before he was injured, although he was put to work with the machine the last time before his injury about six weeks before the accident. During this time, but a few hours each day was devoted to straightening hubs. Plaintiff's estimate is that they worked on these hubs in all about three or four days during the six weeks. A jury was justified in finding that plaintiff was not warned of the dangers incident to the use of the machine, that it was likely to repeat, or that he was given any other kind of warning, or instructed as to the use of the machine, although all this is denied by the defendant. As the hubs were not struck any given number of blows, the machine was at all times under the control of Wilkins, the operator, and he (Wilkins) gave plaintiff a signal as to when he should put his hands in under the hammer to shift the hubs. This signal was generally given by Wilkins with a hammer; and a jury was justified in finding that plaintiff, at the time he received his injuries, had been directed by Wilkins to put his hands under the hammer, for the purpose of removing a hub. At any rate, he had his hands on or near the hub, in an effort to remove the same, when the hammer fell of its own accord, caught one of plaintiff's hands, and caused the injuries of which he complains. It seems that defendant had furnished for use about the

machine a piece of iron pipe about eighteen inches long, which was intended to be placed under the hammer as a matter of precaution when changing dies, or doing other work which necessitated the putting of one's hands under the hammer, to keep the hammer from falling by accident or otherwise; and that Wilkins, the operator, was expected to use it before directing his helper to put his hands upon the hubs. Plaintiff testified that he had seen this pipe alongside the machine, and had seen it placed under the hammer a number of times when hubs were being shaped, and that he thought Wilkins had used it about half the time, but that he did not know why he put the pipe under the hammer; that no one told him what it was for; and that he was never instructed not to put his hands under the hammer until the pipe was in place, or given any other instructions than to do what Wilkins told him.

These latter matters are all denied by defendant, but the jury evidently believed the plaintiff, and we must accept his as the true version. We must also find that Wilkins gave plaintiff a signal to put his hands under the hammer, and that plaintiff did not know whether the pipe had been placed under the hammer or not. These, then, are the material facts, stated most strongly in favor of plaintiff, of course; for a jury had the right to view the testimony in its most favorable light to him.

For appellant it is contended that, no matter if negligence be conceded, plaintiff, as a matter of law, assumed the risk incident to the use of the machine, and was guilty of contributory negligence. These are the only propositions in the case.

As to assumption of risk, it is clear that the plaintiff did not know of the defective and dangerous character of the machine; that he was given no warning or instructions as to how to do his work, except that he was to do what Wilkins told him. A jury was justified in finding that he did not know

1. MASTER AND  
SERVANT: AS-  
sumption of  
risk.

of the defective character of the machine, or of the dangers incident to its use in that condition, and the maxim, "*Volenti non fit injuria*," does not apply.

As to contributory negligence, it must be remembered that while the employer furnished a piece of pipe to be placed under the hammer when it was raised, and it became necessary to do any work with the hands under it, this pipe was in the possession of and under the control of the operator, Wilkins, whose duty it was to see that it was placed in position, and that plaintiff did not know it had not been placed under the hammer when he placed his hands upon the hub. Moreover, it was plaintiff's duty to follow Wilkins' directions, and to take out the hub upon orders from Wilkins. He had the right to assume, therefore, that Wilkins would not order him to place his hands under the hammer until it was safe to do so, and having received the order it was his duty to obey it, unless he actually knew it was unsafe to obey. Even then, unless he knew that it was imprudent for him to put his hands under the hammer without the use of the pipe, he was justified in obeying the orders of his superior.

The rule, as generally stated, in this connection, is that a servant who is injured in consequence of obeying an improper order of his master, or of his master's representative, is not guilty of contributory negligence as a matter of law, unless the risk is so great or the danger so obvious that no prudent person in a like situation would undertake it, even when ordered to do so. *Light v. Railroad*, 93 Iowa, 83; *Gorman v. Des Moines Brick Co.*, 99 Iowa, 257; *Stoutenburgh v. D. G. Co.*, 82 Iowa, 179. In such cases the question is for a jury under proper instructions. *Klaffke v. Axel Co.*, 125 Iowa, 224; *Bell v. Axel Co.*, 146 Iowa, 337. Even if the evidence showed that plaintiff knew the pipe was not in position before placing his hands under

2. SAME: duty of employee: contributory negligence.

the hammer, we still think the question of contributory negligence was for a jury.

Finding no error in the record, the judgment must be, and it is, *affirmed*.

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FANNIE L. PARKER, Appellee, v. THE DES MOINES CITY  
RAILWAY COMPANY, Appellant.

**Street railways: INJURY TO PASSENGER: NEGLIGENCE OF MOTORMAN:**

1 EVIDENCE. In crossing a railroad track the motorman is bound to exercise the highest degree of care for the safety of his passengers, and he is not relieved of this duty merely because a flagman is stationed at the crossing. In this action for injury by collision with a railway train the evidence of the motorman's negligence is such as to require submission of that question to the jury.

Same. The mere fact that the railway company may also have been  
2 negligent will not relieve the street car company from the consequences of its negligence.

**Examination of witnesses: SCOPE OF INQUIRY.** A cause will rarely  
3 be reversed because of the admission of competent testimony developed on cross-examination, though not within the scope of the direct examination; as this is largely a matter of discretion, and the complaining party may, if he desires, cross-examine upon the new points.

**Street railways: CROSSING ACCIDENT: NEGLIGENCE: INSTRUCTION.** It  
4 is the duty of a street car motorman upon approaching a steam railway crossing to take the highest precaution for the discovery of an approaching train, which doubtless includes the duty of stopping his car for that purpose. But having once brought his car under control and stopped the same on approaching the crossing it was not negligence, as matter of law, for him to obey a flagman's signal and proceed over the railroad track without again stopping to look for a train. Under such circumstances the question of his negligence is one of fact.

*Appeal from Polk District Court.*—HON. W. H. McHENRY,  
Judge.

MONDAY, NOVEMBER 20, 1911.

ACTION at law to recover damages for injuries received by plaintiff in a collision between one of defendant's cars and a train being operated by the Chicago, Rock Island & Pacific Railway Company, at a place where the street railway tracks cross the tracks of the steam road, in the city of Des Moines. Trial to a jury, verdict and judgment for plaintiff, and defendant appeals. *Reversed.*

*Guernsey, Parker & Miller*, for appellant.

*Thomas A. Cheshire*, for appellee.

DEEMER, J.—The case as made for plaintiff in the petition is as follows:

That, on the 2d day of September, 1909, she entered one of the passenger cars of the defendant (car No. 169), which was being operated on the Ft. Des Moines Street Railway line. That the said line of the defendant company crosses the railway tracks of the Chicago, Rock Island & Pacific Railway Company at First and Vine Streets, in the city of Des Moines, and that, when the car on which plaintiff was riding reached the intersection of the defendant's track and the tracks of the Chicago, Rock Island & Pacific Railway Company at First and Vine streets, it was struck by an engine and train of the said Chicago, Rock Island & Pacific Railway Company, bound east to the Iowa state fair grounds, in the eastern portion of the city of Des Moines. That the said car on which plaintiff was riding was in charge of a motorman by the name of Williams, and there was stationed there a flagman. That said motorman, as he approached the intersection of the street railway and the Rock Island tracks, did not see the approach of the engine and train on said Rock Island tracks, although said engine and train were in plain sight, and said Rock Island train had the right of way at the intersection of said tracks at said time. That the said motorman did not stop his car north of the intersection of said tracks until the engine and train of

the Rock Island Railway had passed over said crossing, but caused his car to be moved forward over said intersection, with the knowledge or means of knowledge that the Rock Island engine and train had the right of way, and was moving eastward and about to cross said intersection. That the engine of the Rock Island train collided with the car of the defendant company on which the plaintiff was a passenger with great force, and knocked the defendant's car from the track on which it was running from fifteen to twenty feet immediately east of said crossing.

And the grounds of negligence are thus summarized:

That the plaintiff further states that the defendant was negligent, as follows: First. In that its motorman failed to stop his car before it reached the intersection of the tracks of the Rock Island Railway Company. Second. That the defendant was negligent, in that its motorman failed to stop his car at a place north of the track of the Rock Island Railway Company where the passenger train of the latter company would not collide with the defendant's car. Third. That the defendant was negligent, in that its motorman undertook to pass in front of the Rock Island train, which had the right of way. Fourth. That the defendant was negligent, in that its motorman, with knowledge or means of knowledge of the approach of the Rock Island train, caused his car to be moved over the crossing where it would be struck by the Rock Island train.

At the time of the accident complained of, the steam railway had in use a double track, extending from the passenger station of said railway company on Fourth street, in the city of Des Moines, to the fair grounds in said city. The defendant street railway company had a line of tracks in use, extending from Court avenue south and southwest to the army post, located south of the business section of the city of Des Moines, which said track, as it leaves Court avenue, runs along and upon First street for a number of blocks and intersects the Rock Island double track at Vine street, a distance of a block south of Court avenue. Said line of street railway also crosses the Des Moines Union tracks, the

Chicago, Burlington & Quincy tracks, and possibly other tracks located south of Court avenue. The accident happened on September 2, 1909, about 5:30 p. m., at which time the state fair was being held in the city of Des Moines.

At the intersection of the defendant railway tracks with the Chicago, Rock Island & Pacific tracks, there was in operation, prior to the convening of the state fair, a derailer switch just north of the north track of the Rock Island, some thirty-nine feet. The derailer lever, by means of which said switch was opened and closed, is located south of the south track of said Rock Island Railway Company at said track intersection. At the time the state fair convened, the defendant company spiked the derailer switch, so it could not be operated, and placed at the intersection of said tracks a flagman, whose duty it was to look for approaching trains on the Rock Island tracks, and give signals to the motormen to stop or cross, as occasion might warrant. Previous to this time, however, no switchman was located at such track intersection. The custom was for the motorman to approach the derailer switch and stop just north thereof. The conductor would get out of the car, cross the tracks, look for approaching trains, go to the derailer lever south of the tracks, close the switch, and, if the Rock Island tracks were free from approaching trains in near proximity, give a signal to the motorman to come ahead. During the state fair, however, the defendant company installed a switchman system, and the switchman was required to do the work which had been previously imposed upon the conductor and motorman.

The Chicago, Rock Island & Pacific Railway Company had also placed at said track intersection a flagman to warn, not only the motormen of street railway cars, but the traveling public who might be attempting to use the crossing.

On the day of the accident, the plaintiff took passage on car No. 169 at the corner of Fourth and Court avenue to go to her home at some point south of the Chicago, Rock

Island & Pacific Railway tracks. The car was well filled with passengers. It is undisputed that as the motorman, Williams, approached the derailer switch north of the north track of the Chicago, Rock Island & Pacific Railway Company on First street he brought his car to a stop at the usual stopping place. On the northwest corner of the intersection of First and Vine streets there was a three-story, brick building covering the entire quarter block. The Kratzer Carriage Company building was located on the southwest corner of said street intersection. Vine street, between First and Second streets, is built up on both sides with business buildings. Between Second and Third on Vine street were also buildings extending out to the street lines. The motorman, as he stopped at the derailer switch, could not see to the passenger depot of the Chicago, Rock Island & Pacific Railway Company located on Fourth street. The undisputed evidence is that, on account of the brick building on the northwest corner of the street intersection, and also a garage shanty or lean-to on the south side thereof, he had a view only of about one hundred and ninety feet, or to the alley running north and south between First and Second streets. It is also shown that when he stopped he looked both east and west, and saw no trains or moving cars on the Rock Island tracks. As he stopped, the flagman, located at the track intersection, gave him a signal to come on. He at once released his brake, turned on the current, and moved southward at the rate of five or six miles per hour. As the front of his car reached the north rail of the north Rock Island track, the flagmen, either the one placed there by the defendant or the Rock Island Company, began to signal to the motorman to stop his car. The motorman at that instant saw the approaching engine, applied his brakes, turned off the current, and did all that was possible to stop the car, but before he could stop the same it had entered upon the south track of the Rock Island Company, and the train coming from the west collided with his car, carrying it a distance of

some twenty-five feet to the steel bridge of the Rock Island Company spanning the Des Moines river.

The motorman testified that he did not remember of having looked to the west for approaching trains after he stopped his car at the derailer switch and looked to the west and saw no train approaching. The undisputed evidence is that the train which collided with the defendant's car was proceeding from the passenger station at Fourth street to the fair grounds. There were six or seven cars attached to the engine, which was backing eastward. There was no one stationed on the tender of the engine to give signals of approaching danger. The train, as shown by the evidence, was running from twelve to fifteen miles per hour as it approached First street. It started from Fourth street, a distance of three blocks, was continually gaining headway, throttle was open, and it was proceeding very rapidly until it passed the alleyway running north and south between First and Second streets. The city ordinance of the city of Des Moines at the time provided that no train on any steam railway tracks should be operated within the city limits at a greater rate of speed than six miles per hour.

The case was submitted to the jury under instructions, some of which are challenged, and a verdict was returned for plaintiff in the sum of \$5,500, upon which judgment was rendered in due course. Many errors are assigned, but the argument is confined to six main propositions. These will be considered in the same order as found in appellant's brief.

I. It is strenuously insisted that the verdict has no support in the testimony, and that no negligence on the part of the motorman is shown. With this contention we can not

I. STREET RAIL-  
WAYS: injury  
to passenger:  
negligence of  
motorman:  
evidence.

agree. In addition to the facts already recited, it appears that the motorman on defendant's car knew that the steam railway had habitually disregarded the speed ordinance;

that it was customary for it to run its trains at the rate of speed that the train had which struck the street car; that

the train with which the street car collided was being moved by an engine which was working steam full blast, with clouds of smoke and steam arising from the smokestack, with the engine bell ringing, and nothing save the obstructions heretofore mentioned to obstruct the view of the motorman. The defendant company had rules in force, at the time of the accident, from which we quote the following:

All street cars must come to a full stop before crossing any railroad track.

Should a motorman fail to stop a car, the conductor must see that he does stop.

The conductor must cross the railroad tracks, going clear to the opposite side of all tracks, looking in both directions on the railroad for approaching trains, engines or cars, and must not signal his motorman to cross until all moving trains, engines and cars have passed, and until he has seen that no other trains, engines or cars are following. When all is clear, the conductor will close the derailing switch, if there is one, and signal the motorman to cross. The motorman must close the car gates while crossing the tracks, and must not start his car until signal is given by conductor, and must then look for trains or other possible trouble before starting his car.

Motorman must not start car when crossings are run or derailleurs closed by any person other than his conductor or some other employee of this company. During daylight the conductor will give signal to start by a full swing of his arm from a back position to a forward position.

The employees of defendant failed to comply with this rule; but it is contended that by reason of the spiking of the switch this rule was abrogated. As to this, more hereafter. It also appears that at the place where the motorman stopped his car he could not see a train approaching from the west for more than one hundred and ninety feet; that without again stopping or looking toward the west he obeyed the signal of the flagman, and attempted to run over the crossing. By stopping or looking at a point fifteen or twenty feet north of the steam railway tracks, he could have seen

the approach of the train in ample time to have avoided the collision. The motorman knew that the steam road had trains running every ten minutes to and from the fair grounds on the day the accident happened, and testified that after he started to obey the signal of one of the flagmen he did not look west to see if a train was approaching until the front trucks of his car were upon the north track of the Rock Island Railway. True the motorman stopped the car at the accustomed place when the derailer was in use, but he knew that this switch had been spiked, and there was no necessity for his stopping at that particular place. By going twelve feet farther south, he could have seen the approaching train in time to have avoided the collision. Stopping there, he would have been from forty to fifty feet north of the place where his car was struck. Manifestly the question of the negligence of the motorman was for a jury. The presence of the flagman did not relieve the motorman from the exercise of the highest degree of care, for the reason that he was in control of a car filled with human beings, who were practically helpless, and had a right to rely upon the fact that the motorman would use a proper degree of care for their safety. The motorman was not justified in relaxing his vigilance because of the presence of the flagman. *Phila. R. R. v. Boyer*, 97 Pa. 91; *Selma St. Ry. Co. v. Owen*, 132 Ala. 420 (31 South. 598); *Cin. Co. v. Murray*, 53 Ohio St. 570 (42 N. E. 596, 30 L. R. A. 508).

That the employees of the steam railway company were also negligent does not relieve the defendant company. *Matthews v. Railway Co.*, 56 N. J. Law, 34 (27 Atl. 919, 22 L. R. A. 261); *O'Toole v. Pittsburg Co.*, 158 Pa. 99 (27 Atl. 737, 22 L. R. A. 606, 38 Am. St. Rep. 830); *Schneider v. Second Ave. Co.*, 133 N. Y. 583 (30 N. E. 752). There was ample testimony to take the case to the jury.

The motorman, Williams, was a witness for the defendant, and he testified in chief as to what he did at and before

the time of the collision. On cross-examination, over defendant's objections, he was permitted to testify as to a custom of the Rock Island and other steam companies to run their trains over the street car crossings at excessive rates of speed. The ruling permitting this line of examination is challenged, for the reason that no such field was opened by the examination in chief. Appellate courts rarely interfere with such rulings. As the plaintiff had the right to make the witness her own, the trial court did not abuse its discretion in permitting the witness to answer the questions on cross-examination. If defendant had desired it, he might have cross-examined the witness upon the new points brought out by the cross-examination. At any rate, we are not justified in reversing the case because of the rulings complained of. *Glenn v. Gleason*, 61 Iowa 32; *People v. O. & F.*, 83 N. Y. 436; *Chicago Co. v. Merchants' Co.*, 83 Ill. App. 241. The testimony adduced was competent, and no prejudice is shown.

III. The trial court gave the following instructions: "In determining whether or not this defendant was guilty of negligence, you will take into consideration the fact that the law requires of them the highest degree of care and prudence reasonably consistent with the practical operation of its railway. You will consider whether the motorman of the defendant's car in charge thereof used all his faculties of sight and hearing to ascertain the approach of danger; whether he stopped his car and looked and listened for the approach of trains on the Chicago, Rock Island & Pacific Railway; whether he used the degree of care above stated in all the things he did with reference to the management and operation of said car. *And you are instructed that it was the duty of the said motorman to stop and look at the point where he might reasonably expect to see the approach of a train on the Chicago, Rock Island & Pacific Railway track.* The duty of the defendant, however, does not require it to

3. EXAMINATION  
OF WITNESSES:  
scope of in-  
quiry.

4. STREET RAIL-  
WAYS: cross-  
ing accident:  
negligence:  
instruction.

act as an insurer of the lives and safety of its passengers. And when they have exercised the degree of care and prudence required, as hereinbefore explained to you, they are not responsible for accidents which occur from reasons beyond their control; and notwithstanding the exercise of this prudence and foresight required." The italicized portion of this instruction is vigorously assailed, and to our minds this presents the only doubtful question in the case. Was the motorman, in the exercise of the highest degree of care, required, as a matter of law, to stop and look at a point where he might reasonably expect to see the approach of a train on the steam railway?

We are constrained to hold that this instruction is too broad, and that it can not be sustained. As applied to the facts in the case, it was a virtual direction to the jury to find a verdict for the plaintiff; for, under the conceded facts, the motorman, although he stopped his car, did not do so at the point where he might reasonably have expected to see the approach of the train on the Rock Island tracks. The general rule is that both negligence and contributory negligence are questions for a jury, and the only exceptions arise where the facts are so clear that reasonable minds would not differ in their conclusions upon the subject. Of course, it was the duty of the motorman to look and listen for approaching trains upon the Rock Island track, and it may and doubtless was his duty to stop his car when approaching the track; but, having stopped his car and brought it under control, was it negligent for him to obey the flagmen's signals, and to proceed to cross the railway track without again stopping his car to see if a train was approaching? This is the pivotal question in the case. The trial court instructed that he owed such duty as a matter of law, and that if he failed to stop a second time he was guilty of negligence as a matter of law. We think the question, not one of law, but of fact for a jury. Of course, a jury might have found the motorman negligent in not stopping at the right place, or in failing to stop a

second time, after having once stopped at a place where he could not see an approaching train for a distance of more than one hundred and ninety feet, and if it had so found no court would be justified in interfering. But such conclusion is not the only one which might fairly be arrived at, in view of the presence of the flagman at the crossing and of the fact that the motorman had once stopped his car to get it under control and look for trouble. The whole matter was for a jury under proper instructions. Appellees say that under many decisions ordinary care may require one to stop, look, and listen for approaching trains before crossing a railway track; but, whatever the rule in other states, whatever the dictum in earlier cases, it is not the present rule of this court that one about to cross a railway track is bound, as a matter of law, to stop and look and listen. He is required to exercise his senses and look and listen, but he is not required to stop at any given place, as a matter of law. *Selensky v. Railroad*, 120 Iowa, 113; *Artz v. Railroad*, 34 Iowa, 153; *Starry v. Railroad*, 51 Iowa, 419; *Lang v. Railroad*, 49 Iowa, 469; *Benton v. Railroad*, 42 Iowa, 192; *Wesley v. Railroad*, 84 Iowa, 441; *Buelow v. Railroad*, 92 Iowa, 240; *Moore v. Railroad*, 102 Iowa, 595; *Schulte v. Railroad*, 114 Iowa, 89; *Reed v. Railroad*, 74 Iowa, 188; *Schmidt v. Railroad*, 75 Iowa, 606; *Willfong v. Railroad*, 116 Iowa, 548; *Meyer v. Railroad*, 134 Iowa, 722; *Hartman v. Railroad*, 132 Iowa, 582.

It is true, of course, that the motorman who was driving the car in question was bound to the exercise of the highest degree of care, foresight, and prudence in caring for the passengers on his car; but in view of the presence of the flagman at the crossing, it was, as we think, a question for the jury to determine whether or not, in the exercise of that care, he should have stopped his car at a different place from the one selected by him, or, having stopped where he did, should have stopped again, before proceeding to cross the steam railway tracks. Of course, the rule of the defendant

company should be considered on this branch of the case; but that rule did not require that stops be made at any particular place, although, of course, if a derailer switch was in operation, the stop would have to be made before the switch was reached; or that he should stop more than once when crossing the railway tracks. That the duty to stop at any given place was a question of fact for a jury, rather than of law for the court, see the following, among other, cases: *Gates v. Railroad*, 154 Pa. 566 (26 Atl. 598); *Colorado Co. v. Martin*, 7 Colo. 592 (4 Pac. 1118); *Annas v. Railroad*, 67 Wis. 46 (30 N. W. 282, 58 Am. Rep. 848); *Wood v. Railroad*, 84 Ga. 363 (10 S. E. 967); *Reed v. Railroad*, 74 Iowa, 188; *Chicago R. R. v. Hansen*, 166 Ill. 623 (46 N. E. 1071); *Winey v. Railroad*, 92 Iowa, 622; *Abbot v. Dwinell*, 74 Wis. 514 (43 N. W. 496); *Eilert v. Green Bay Co.*, 48 Wis., 606 (4 N. W. 769); *Chase v. Railroad*, 78 Me. 346 (5 Atl. 771); *Eskridge v. Railroad*, 89 Ky. 367 (12 S. W. 580); *Chicago R. R. v. Wilson*, 133 Ill. 55 (24 N. E. 555). We have found no decisions to the contrary, and counsel have cited nothing in support of the instruction. It can not be approved as a correct announcement of the law, without danger of making a vicious precedent.

There seems to be no merit in any of the other contentions made for the appellant; but for the error pointed out the judgment must be, and it is, *reversed*.

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STATE OF IOWA V. CHARLES HAYWARD, Appellant.

**Criminal law:** LARCENY: PROOF OF VALUE: INSTRUCTIONS. Where all the evidence on a prosecution for larceny placed the value of the stolen property at more than twenty dollars, and the court charged that the state must prove the value beyond a reasonable doubt, there was no necessity for the court to further instruct that if there was a reasonable doubt as to the value it must be fixed at twenty dollars or less, and omission to do so was not erroneous.

**Same:** CIRCUMSTANTIAL EVIDENCE: INSTRUCTION. Where the evidence  
2 on a trial for larceny showed that defendant was at the place where the property was stolen from shortly before the larceny and that shortly afterward the property was found in his possession, and the court fully instructed on the effect of recent possession, failure to instruct with respect to circumstantial evidence was not erroneous, especially as there was no request therefor.

**Same:** RECENT POSSESSION: INSTRUCTION. An instruction that where  
3 the possession of recently stolen property is unexplained the presumption arises that the person in possession thereof is the one who committed the larceny, and in the absence of any explanation the fact of such possession is sufficient to warrant conviction, unless the facts and circumstances disclosing the possession and nature of it are such as to leave a reasonable doubt whether such person may not have come honestly into the possession of the property, is correct.

**Same:** PRESUMPTION OF INNOCENCE: INSTRUCTION. Where the court  
4 instructs that every material element of the crime charged must be proved beyond a reasonable doubt, this of itself pre-supposes the innocence of the accused, and there is no necessity for telling the jury that the law presumes every man innocent until he is proven guilty.

**Same:** MISCONDUCT IN ARGUMENT. Misstatement of the record by  
5 the prosecuting attorney in argument is without prejudice, where, as in this case, the evidence was limited to proof of the fact that defendant was at the place of the larceny and shortly thereafter had possession of the stolen property.

**Same:** CONTINUANCE: ABSENT WITNESSES: DILIGENCE: EVIDENCE. An  
6 application for a continuance because of inability to procure witnesses must disclose a diligent effort to have them present at the trial, otherwise it should not be granted. Evidence of diligence held insufficient.

*Appeal from Pottawattamie District Court.*—HON. O. D. WHEELER, Judge.

TUESDAY, DECEMBER 12, 1911.

THE defendant was convicted of the crime of larceny, and appeals. *Affirmed.*

W. H. Schurz, for appellant.

George Cosson, Attorney-General, and John Fletcher, Assistant Attorney-General, for the State.

SHERWIN, C. J.—I. The indictment charged the larceny of a box of shoes of the value of \$35. The undisputed evidence showed that there were at least twenty-four pairs of shoes in the box, and that they were of the value of \$1.50 per pair. In a general instruction, the jury was told that to convict of the crime charged the state must prove the value of the shoes, and in another instruction it was said, in effect, that such value must be proven beyond a reasonable doubt. All of the evidence on the subject of value placed it at more than \$30; and hence there was no occasion to instruct that if there was any reasonable doubt as to its value it must be fixed at \$20, or less. *State v. Burton*, 103 Iowa, 28.

II. It is contended that the conviction depended upon circumstantial evidence, and that the court erred in not instructing thereon. No request of this kind was made, and no instruction of the kind was necessary under the evidence. It was shown by the state that the defendant was at the place of the stealing shortly before the property was taken, and that the property was found in his possession a short time thereafter. There were only two circumstances before the jury tending to show the defendant's guilt; one was his presence at the scene of the theft, and the other was his possession of the stolen property. The court fully instructed on the effect of the latter circumstance, and we think that was sufficient.

III. It is urged that the court instructed that the possession of recently stolen property cast the burden on the defendant of showing that he acquired it honestly; but the counsel has evidently failed to carefully read the instruction complained of. The jury was told therein that, where

1. CRIMINAL LAW:  
larceny: proof  
of value: in-  
structions.

2. SAME: circum-  
stantial evi-  
dence: instruc-  
tion.

the possession of recently stolen property is unexplained, the presumption arises that the person in possession thereof is the person who committed the theft, and, in the absence of any explanation, the fact of such possession is sufficient to warrant a conviction, "unless the evidence and circumstances disclosing such possession and the nature of it are such as to leave in the mind a reasonable doubt whether such person may not have come honestly into the possession of such property." The rule announced in the instructions is clearly right, and has frequently had our approval. *State v. Kimes*, 145 Iowa, 346; *State v. Brundige*, 118 Iowa, 92; *State v. Peterson*, 67 Iowa, 564; *State v. Hopkins*, 65 Iowa, 240; *State v. Richart*, 57 Iowa, 245.

IV. Error is predicated on the failure of the court to instruct, without a request therefor, that the law presumes every man innocent until he is proven guilty. While such an instruction would have been proper, it was not necessary. The court instructed that every material element of the crime charged must be proven beyond a reasonable doubt, and this, in itself, presupposes the innocence of the accused. In addition to this, jurors of ordinary intelligence understand that in law every man is presumed to be innocent until proven guilty beyond a reasonable doubt.

V. Complaint is made of statements of the county attorney in his argument to the jury, but we find nothing therein of a prejudicial nature, in view of the statements of the court to the jury. If an attorney misstates the record to the jury, particularly where the evidence is as limited as it was here, the jury will know it as soon as any one, and neither the attorney nor his cause will profit thereby.

VI. The defendant was indicted on the 17th day of January, and pleaded not guilty on the 19th day of January, and on the 10th day of February the court assigned the case

3. SAME: recent possession: instruction.

4. SAME: presumption of innocence: instruction.

5. SAME: misconduct in argument.

for trial on the 14th day of February. On the 13th day of February, the defendant asked a continuance, because of his alleged inability to procure certain witnesses. The motion was overruled, and the ruling is said to be reversible error. In his own affidavit in support of his motion for a continuance, the defendant stated that he had been in custody on this charge since the 28th day of November, 1910, over a month and a half before the finding of the indictment, and that two men, one of whom was with him when he was arrested on the charge, and both residents of Omaha, Neb., were material witnesses for him. He made no statement that he had attempted to procure their testimony. His attorney also made an affidavit as to the materiality of the testimony of these witnesses, and stated further that he had been the defendant's attorney since December 1, 1910, and had been unable to locate the witnesses since the case was set for trial on the 10th day of February. Both counsel and the defendant stated that they did not know the name of the express driver in whose conveyance and presence the defendant was arrested on the 28th day of November. Clearly there was no showing of diligence, and the court rightly overruled the application for a continuance.

VII. We think the evidence sufficient to sustain the verdict, and the judgment is therefore *affirmed*.

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IN RE ESTATE OF JOHN F. PITT, Deceased,

**Estates of decedents: CLERK'S FEE: HOW DETERMINED.** The real property of an intestate and the rents arising therefrom descend immediately upon his death to his heirs, and except as the same may be required for the payment of debts are not to be considered in estimating the value of the estate, for the purpose of determining the fee which the clerk of courts is authorized to charge for his services in the settlement of the estate. Thus where the intestate left a homestead and real property in another

state, neither of which were required for the payment of debts, the value of the same should not be considered in fixing the clerk's fee.

*Appeal from Polk District Court.*—HON. LAWRENCE DE GRAFF, Judge.

TUESDAY, DECEMBER 12, 1911.

JOHN F. PITT, a resident of Polk county, died intestate February 4, 1910, leaving a widow and two daughters, one a resident of Des Moines and the other of Washington, D. C. The property left by him consisted of a house and lot situated in Des Moines occupied by deceased as a homestead and thereafter by the widow and unmarried sister, of the value of \$3,500, a half interest in certain real estate in the state of Idaho valued at \$4,000, a leasehold interest in a lot and part of another located in Des Moines of no value above the amount of rent reserved, and \$5,000 in personal property. The widow presented a petition alleging the property of deceased and its value as above recited, and prayed that she be appointed administratrix of the estate, accompanied by a sufficient bond, to the clerk of the district court of Polk county, and at the same time tendered \$5 as the fees to which the officer was entitled for services to be rendered in the settlement of the estate. The clerk declined to receive the same or to file the petition or approve the bond or issue letters of administration unless the maximum fee of \$10 was first paid. Such sum was subsequently paid under protest, and a motion in the district court to retax was overruled. Upon certificate of the presiding judge that an appeal should be allowed, the administratrix has brought the case to this court.—*Reversed*.

*Dale & Harrison*, for appellant.

*W. S. Ayres*, for appellee.

LADD, J.—The sole issue is whether the clerk of the district court was authorized by section 296 of the Code Supplement to exact the payment of a fee of \$10 for his official services in the estate of John F. Pitt, deceased. He was "entitled to charge and collect . . . for all services performed in the settlement of the estate of any decedent, except where actions are brought by the administrator or against him, or as otherwise may be provided herein, where the value of the estate does not exceed three thousand dollars, three dollars; where such value is between three and five thousand dollars, five dollars; where such value is between five and seven thousand dollars, eight dollars; where the value exceeds seven thousand dollars, ten dollars."

Deceased left personal property of the estimated value of \$5,000, which was amply sufficient to satisfy all debts, a homestead valued at \$3,500, a leasehold interest of no value, and an half interest in certain land situated in the state of Idaho of the value of \$4,000. If, then, the value of the homestead or the land in the state of Idaho be included in estimating the value of the state, the clerk was right in fixing his fees at \$10; but, if these are to be excluded, the tender of \$5 made by the administratrix was sufficient. The propriety of demanding the fees in advance is not questioned by appellant and for this reason is not considered. It is apparent that no services by the clerk with reference to either tract of real estate were possible. The homestead either continued as such in the occupancy of the widow, or descended directly to the heirs of deceased, and in either event was exempt from any indebtedness contracted since it was acquired. Section 2985, Code. As the personal property was ample for the discharge of the debts of the deceased, neither the homestead, even though acquired subsequent to the creation of these, nor the land in Idaho, even though auxiliary proceedings might have been resorted to for the payment of the debts, could

be resorted to for this purpose. So that the rendition of services by the clerk in connection with the devolution of title was impossible unless it were in filing the affidavit of the administratrix stating the list of heirs or in examining the records of the county to ascertain if deceased left real estate; but compensation for such examination is to be specially allowed by the court. Section 3412, Code. Neither the filing of such affidavit nor the examination can in any manner affect the transmission of title to the real estate.

It descends to the heirs *eo instante* upon the death of the ancestor with the quantity of each definitely ascertained. From that instant, subject to the right of the administratrix to resort thereto for the payment of the debts of the deceased, they may dispose of the particular property as owners as they choose and are entitled to possession and to the rents and profits. If, in certain contingencies, the administrator takes possession of real estate, this is as official agent of the owners to care for the estate and conserve the rents and profits for their benefit under the direction of the court. The devolution of title is not interrupted or affected thereby, nor by the right of the administrator to sell or mortgage for the satisfaction of debts as each heir may transfer his definite portion subject thereto. *Herriott v. Potter*, 115 Iowa, 648; *Schneider v. Schneider*, 125 Iowa, 1; *In re Estate of Pennock*, 122 Iowa, 622; *Hook v. Garfield Coal Co.*, 112 Iowa, 210.

The land, or its recent rents and profits, can only be resorted to for the satisfaction of debts for the payment of which the personal estate is inadequate, and then only on suit brought by the administrator to which the heirs are made parties and have notice. *Toering v. Lamp*, 77 Iowa, 490; *Valley Nat. Bank v. Crosby*, 108 Iowa, 656; *Milburn v. East*, 128 Iowa, 101.

But the paragraph of the statute quoted expressly excepts actions by or against the administrator, and manifestly for the reason that ample provision is made for the clerk

in the taxation of costs therein. Whether the proceeds derived from the sale of land on application of the administrator may be included in estimating the value of an estate in fixing the fees of the clerk, there is no occasion to determine, for until such sale these do not come into the hands of the administrator for distribution, and surely the clerk can not assume in advance that a sale will be necessary, and therefore include the value of land in estimating his fees.

Enough has been said to make it clear that ordinarily no services are rendered by the clerk in connection with real property in the administration of an estate of a deceased person, and that none were or might reasonably be expected to be rendered in connection with the homestead or land in Idaho left by Pitt. This statute and all others relating to the payment of fees proceed on the theory that such payment is exacted for something actually done by the officer for the benefit of the litigant, and we are of opinion that the word "estate," as employed in the paragraph of the statute quoted, means the estate administered in court.

The services for which compensation is allowed are those rendered "in the settlement of the estate," and "the value of the estate" by which the amount of the clerk's fee is to be determined is of that being settled in court. Primarily, the administration is of personal property only. An inventory of chattels only is required (sections 3300, 3311, Code), and whether it shall be involved in the administration is contingent on whether there shall be enough personalty to satisfy the debts. Our conclusion is that the word "estate" is employed in the paragraph quoted in a restricted sense of the estate to be administered, and not broadly as referring to that not involved therein regardless of location. It follows that the clerk was entitled to collect but \$5 as his fees, and the order of the district court is *reversed*.

GEORGE A. STOKE, Appellant, v. F. W. CONVERSE, MACK GROVES, GEORGE GROVES, W. H. HODGE, and M. M. HECK, Appellees.

**Fraudulent conveyances: MEASURE OF DAMAGES.** In an action for damages based on a misrepresentation of the value of property sold, the measure of damage is the difference between the market value of the property as it actually was and the value it was represented to have, unaffected by the market value of other property which was to be exchanged in payment therefor; it being immaterial whether the injured party was to pay for the same in cash or in property.

*Appeal from Emmet District Court.*—HON. D. F. COYLE, Judge.

WEDNESDAY, DECEMBER 13, 1911.

ACTION for damages because of alleged misrepresentation and guaranty of invoice value of goods resulted in a verdict for defendants, and from judgment thereon the plaintiff appeals.—*Reversed.*

*Sullivan & McMahon* and *E. A. Morling*, for appellant.

*N. J. Lee* and *J. G. Myerly*, for appellees.

LADD, J.—The plaintiff owned three hundred and twenty acres of land in Redwood county, Minn., subject to a mortgage of \$6,000 on which there was interest accrued amounting to \$300. One Hodge had acquired by trade a stock of goods, caused it to be moved to Estherville, and a bill of sale thereof deposited with the defendant,

Converse, as security of an indebtedness of Hodge to the bank of which Converse was cashier. An exchange of this stock of goods was made for the land subject to the incumbrance, and plaintiff says that he was induced so to do by the representation of Converse that there were from \$6,700 to \$7,000 worth of goods in the stock as shown by the invoice and bills, whereas the value of said goods did not exceed \$1,200; that such representation was false, and so known to be, and was made to deceive the plaintiff. The defense was a general denial. An issue of whether the value of the goods was guaranteed also was tried. At the close of the evidence the petition was dismissed as to all defendants other than Converse, and with respect to the measure of damages on the issue of fraud the court instructed the jury that:

The first claim of plaintiff, as submitted to you in the foregoing instructions, is a claim for damages for false and fraudulent representations. If you find for plaintiff on this issue, you will allow him as damages the difference between the reasonable market value of the stock and fixtures, as the stock and fixtures actually were at the time of the exchange, and the reasonable market value of the stock and fixtures as that value would have been if the stock and fixtures had been as represented, provided the reasonable market value of the land exchanged over and above the mortgage and interest was equal to or greater than the same. But if the reasonable market value of the land over and above the mortgage and interest was less than the reasonable market value of the stock and fixtures as that value would have been if the stock and fixtures had been as represented, you should allow plaintiff, if you find for him, the difference between the reasonable market value of the stock and fixtures as the stock and fixtures actually were, and the reasonable market value of the land over and above the mortgage and interest at the time of the exchange.

An exception thereto was taken, and it is contended that the measure of damages as stated is erroneous because

of the qualification limiting the market value of the stock of goods and fixtures as represented by the market value of the land exchanged. In other words, appellant contends that the true measure of damages is the difference between the market value of the stock of goods and fixtures as they were and as they were represented to be. In the early case of *Likes v. Baer*, 8 Iowa, 368, the rule was laid down as last stated. The plaintiff exchanged land in Clark county to defendant for other land in Ringgold county, and in the suit claimed that defendant had falsely represented the quality of his land. The court approved an instruction authorizing the allowance of damages "equal to the difference between the actual value of the land and what it would have been worth had it answered the description given of it by the defendant." A rehearing was granted; but in an opinion which seems to have been supplemental to that first filed, found in 10 Iowa, 89, wherein the ruling on the admissibility of evidence was changed, Wright, C. J., observed that "in other respects there is no error." Had the opinion in 8 Iowa, 368, been withdrawn, it likely would not have appeared in the official reports, for the granting of a rehearing has the effect to withdraw the opinion previously filed, and it then is of no force or authority, unless subsequently adopted by the court. Moreover, the portion of this opinion confirming the measure of damages as stated by the trial court often has been cited with approval. See *Gates v. Reynolds*, 13 Iowa, 1, involving an exchange of lands, wherein the court instructed similarly to the charge in the case at bar, and in which this court, after observing its appropriateness in event of rescission, held the measure of damages should have been stated as in the *Likes* case. *Moberly v. Alexander*, 19 Iowa, 162; *Stewart v. Jack*, 78 Iowa, 154; *Douglas v. Moses*, 89 Iowa, 40, where it is said the measure of damages laid down in *Likes v. Baer* has been the law of Iowa

for forty years; *Short v. Matteson*, 81 Iowa, 638; *Callanan v. Broun*, 31 Iowa, 333.

In *HIGH v. Kistner*, 44 Iowa, 79, it is said that testimony of the value of property received was not admissible for the purpose of fixing the measure of damages, and this was quoted with apparent approval in *Vaupel v. Mulhall*, 141 Iowa, 365. In *Jay v. Bitzer*, 77 Iowa, 73, it was said that the measure of damages is the same in cases of breaches of warranty and fraud. In *Boddy v. Henry*, 113 Iowa, 462, an exchange of land for stock in a company owning Texas lands, we said that the proper rule for the measure of damages "would be to find out how much less the value of the stock was than it would have been if the representations had been true." Again, in *Howerton v. Augustine*, 130 Iowa, 389, is to be found language of similar import.

*Howes v. Axtell*, 74 Iowa, 400, has been cited as announcing a contrary doctrine; but an instruction was approved therein which said to the jury: "The rule of law is this: To ascertain the difference in the value of land as it was represented to be and its value as it really was, and that difference is the plaintiff's damages." See, also, *White v. Smith*, 54 Iowa, 233; *Hahn v. Cummings*, 3 Iowa, 583. An expression may be found in *Mattauch v. Walsh*, 136 Iowa, 225, intimating the rule to be as laid down by the trial court; but, as the question there involved was whether there was sufficient evidence to carry the case to the jury, what was said concerning the measure of damages must be regarded as *obiter*. In *Robbins v. Selby*, 144 Iowa, 407, the measure of damages as applied by the trial court was not questioned, and all said was that the evidence sustained the findings as made. In *Fagan v. Hook*, 134 Iowa, 381, the contract was rescinded, and, as universally held, the measure of damages applied was the difference between values of the properties transferred. It is to be said, however, that *Mattauch v. Walsh*

and *Robbins v. Selby*, furnished some ground for thinking that the earlier decisions of this court may have become unsatisfactory, and for this reason we may advert to the conflict of authorities elsewhere. In one class of cases, the measure of damages in actions for deceit is held to be the difference between the actual value of the property at the time of the purchase and its value if the property had been what it was represented to be, and in the other the difference between the real value of the property and the value of what was given for it. The grounds for the latter view are tersely expressed by Chief Justice Fuller in *Smith v. Bolles*, 132 U. S. 125 (10 Sup. Ct. 39, 33 L. Ed. 279):

The measure of damages was not the difference between the contract price and the reasonable market value if the property had been as represented to be, even if the stock had been worth the price paid for it; nor, if the stock were worthless, could the plaintiff have recovered the value it would have had if the property had been equal to the representations. What the plaintiff might have gained is not the question, but what he had lost by being deceived into the purchase. The suit was not brought for breach of contract. The gist of the action was that plaintiff was fraudulently induced by the defendant to purchase stock upon the faith of certain false and fraudulent representations, and so as to the other persons on whose claims the plaintiff sought to recover. If the jury believed from the evidence that the defendant was guilty of the fraudulent and false representations alleged, and that the purchase of stock had been made in reliance thereon, then the defendant was liable to respond in such damages as naturally and proximately resulted from the fraud. He was bound to make good the loss sustained, such as the moneys the plaintiff had paid out, and interest, and any other outlay legitimately attributable to defendant's fraudulent conduct; but this liability did not include the expected fruits of an unrealized speculation.

Like reasons were given in *Sigafus v. Porter*, 179 U. S. 116 (21 Sup. Ct. 34, 45 L. Ed. 133), in reversing the

Circuit Court of Appeals, 84 Fed. 430 (28 C. C. A. 443). And this rule has been approved in several states and obtains in England. *Stickney v. Jordan*, 47 Minn. 262 (49 N. W. 980). See 20 Cyc. 135, for collection of cases.

But the overwhelming weight of authority in this country approves the allowance, as the measure of damages, of the difference between the actual value of the property at the time of the purchase and its value if it had been what it was represented to be. In *Morse v. Hutchins*, 102 Mass, 440, in so holding the court observed that: "This is the only rule which will give the purchaser adequate damages for not having the thing which the defendant undertook to sell him. To allow to the plaintiff . . . only the difference between the real value of the property and the price which he was induced to pay for it would be to make any advantage lawfully secured to the innocent purchaser in the original bargain inure to the benefit of the wrongdoer; and, in proportion as the original price was low, would afford a protection to the party who had broken at the expense of the party who was ready to abide by the terms of the contract."

The reasons for the rule are more fully stated in *Krumm v. Beach*, 96 N. Y. 398:

The contention of the appellants is that the defrauded vendee had but one remedy, and that consisted of a rescission of the contract, and a recovery back of the consideration paid, after an offer to reconvey and a tender of what had been received. Doubtless this remedy existed; but the vendee was not compelled to adopt it. He had a right, instead of rescinding the contract, to stand upon it, and require of the vendor its complete performance, or such damages as would be the equivalent of that complete performance. The vendee, acting honestly on his own part, was entitled to the full fruit of his bargain, and could not be deprived of it without his consent by the fraud of the vendor. That such an action, proceeding upon an affirmation of the contract as actually made, founded upon actual fraud, and asking damages in the room of an impossible

specific performance, can be maintained at law, has been sufficiently adjudged. *Wardell v. Fosdick*, 13 Johns. (N. Y.) 325 (7 Am. Dec. 383); *Culver v. Avery*, 7 Wend. (N. Y.) 386 (22 Am. Dec. 586); *Whitney v. Allaire*, 1 N. Y. 305; *Clark v. Baird*, 9 N. Y. 187; *Graves v. Spier*, 58 Barb. (N. Y.) 385. And that is so whether the representations relate to the title or to matters collateral to the land. The measure of damages in such a case is full indemnity to the injured party—the entire amount of his loss occasioned by the fraud. *Dimmick v. Lockwood*, 10 Wend. (N. Y.) 155; *Wardell v. Fosdick* and *Whitney v. Allaire, supra*. The first of these cases plainly points out the difference between actions for a breach of covenant and those founded upon fraud. In the former the damages are always bounded by the consideration and interest, which often fall short of full indemnity—a rule said to be founded upon considerations of public policy, without reference to the actual damage sustained by the party (*Whitney v. Allaire, supra*); but, where fraud is established, full and complete indemnity is awarded; that full indemnity may go beyond the consideration paid. The purchaser of land, as of other property, has a right to make a good bargain, if he can, provided only that he deals honestly. Often the price secured above the price paid is the sole motive for the purchase; and, where there is an exchange of lands to some extent, one dealing fairly may sell his own at a high price, and secure another's at a low one. To the entire benefit of his bargain he is entitled. If there had been no fraud, he would have had it. He should not lose it because the other party had been dishonest. The measure of damages, therefore, should be that adopted by the court below, the difference in value between the property conveyed and that which would have been conveyed had the property been as represented, and the actual contract honestly fulfilled.

In *Gustafson v. Rustemeyer*, 70 Conn. 125 (39 Atl. 104, 39 L. R. A. 644, 66 Am. St. Rep. 92), the authorities are reviewed *pro* and *con* with the conclusion adhering to the rule as last stated. A like conclusion was reached, after reviewing the authorities, in *Howe v. Martin*, 23 Okl. 561 (102 Pac. 128, 138 Am. St. Rep. 840). See, also,

*Boyce v. Gingrich*, 154 Mo. App. 198 (134 S. W. 79); *McCrary v. Pritchard*, 119 Ga. 876 (47 S. E. 341), and *Hecht v. Metzler*, 14 Utah, 408 (48 Pac. 37, 60 Am. St. Rep. 906), and cases collected in 20 Cyc. 133. In 4 Sutherland on Damages, section 1171, the author says the party guilty of the fraud "is to make good his representations as though he had given a warranty to that effect;" and further on: "The general rule as above stated is based on the assumption that the amount is the measure of value as fixed by the parties; but a purchaser does not buy to sell again at the same price, and to compel him arbitrarily to accept compensation by that standard is to deprive him of such benefit of his purchase as the state of the market would have enabled him to realize if there had been no fraud." It is said, in Bigelow on Frauds, 627, that, in actions for deceit or breach of warranty in sales of personalty or realty, the rule as last stated is well settled.

It can make no difference whether the innocent party pay in money or in property. In either event he is entitled to the price he fixed and the other party undertook to pay, and ought not to be compelled to accept a lower price because of another's fraud, and thereby allow the wrongdoer a bargain he could not have obtained by fair dealing. Otherwise the wrongdoer may speculate on the outcome of his fraudulent enterprise without possibility of loss, for, under the rule as stated in the instruction quoted, in no event would he be liable for more than the value received by him. But if compelled to make good his representations, he is not paying the innocent party a speculative price, but that which he represented him to be getting, and for which such innocent party parted with the consideration paid. We discover no reason to depart from the rule as laid down in *Likes v. Baer*, 8 Iowa, 368, and followed since, i. e., that the measure of damages for deceit is the difference between the market value of the property as it really was at the time of the purchase and the

market value thereof as it would have been if as represented.

There is nothing in the suggestion that plaintiff tried the case on another theory. Though recitals of value are to be found in the petition, the measure of damages claimed was not mentioned, and, in calling witnesses to testify as to value of the farm exchanged for the stock of goods, counsel for plaintiff suggested that the evidence was in rebuttal, but that he wished to examine the witnesses then, as they wished to go home, and at the same time said, "Our theory is that the proper measure of damages is the difference between the stock as represented and its actual value." After the witnesses had been examined, a colloquy occurred between court and counsel in which the latter repeated his contention that the measure of damages would be the difference in the values of the stock of goods as it was and as it would have been if as represented, and the court suggested that, though such were the rule, if cash were paid, where properties were exchanged, the difference between the values of such properties would be the measure of damage. Surely nothing said was calculated to mislead the court, nor was it to be inferred from the calling of the witnesses that the measure of damages claimed was that suggested by the court. Nor was it to be inferred from nothing more being said during the trial and the failure to request an instruction that counsel acquiesced in the suggestion. He had the right to rely on the court if the jury were to be instructed to state the law correctly. We reach the conclusion that the court erred in giving the instruction set out, and that such error was not induced by anything done by appellant.

Other errors assigned likely will not arise on another trial.—*Reversed.*

J. H. HENDERSON, Appellant, v. BOARD OF SUPERVISORS OF  
POLK COUNTY, IOWA, and DRAINAGE DISTRICT No. 6,  
POLK COUNTY, IOWA, Appellee.

**Appeal:** NOTICE: FAILURE TO STATE DATE OF JUDGMENT. It is not  
1 fatal to the jurisdiction of the Supreme Court that a notice of  
appeal from a single judgment in the case fails to state the date  
of judgment appealed from; nor would the fact that a wrong  
date was stated defeat its jurisdiction.

**Same:** APPEAL TO DISTRICT COURT: NOTICE: SERVICE. Under the pres-  
2 ent statutes the filing of notice of appeal from an assessment in  
drainage proceedings with the county auditor, together with a  
bond duly approved by him, is sufficient to transfer the cause  
to the district court, without serving the notice on the petitioners  
for the drainage improvement.

*Appeal from Polk District Court.*—HON. W. M. McHENRY,  
Judge.

WEDNESDAY, DECEMBER 13, 1911.

APPEAL from an assessment of benefits in a drainage  
proceeding. From the order of the board of supervisors  
the plaintiff appealed to the district court of Polk county.  
Upon motion of the defendants, the appeal was dismissed  
for want of jurisdiction. From the order of dismissal  
entered by the district court, plaintiff has appealed.—*Re-  
versed.*

*Stewart & Hexteu*, for appellant.

*John P. Halloran*, for appellees.

EVANS, J.—The order and judgment of dismissal ap-

pealed from was entered in the district court on December 18, 1909. This fact is made to appear in the appellant's abstract. The notice of appeal, however, described the judgment as having been entered on September 18, 1909.

The appellee moves to dismiss the appeal here for want of jurisdiction on the ground that no notice of appeal from the judgment of December 18, 1909, was ever served. No order was, in fact, entered on September 18, 1909, and the specification of such date in the notice of appeal was a mere error, clerical or otherwise. It was not essential to the notice of appeal that any date of the judgment should be specified; there being but one judgment in the case. Nor will a mere mistake in the notice of appeal, specifying the wrong date of the judgment, operate to defeat the jurisdiction of this court. This has been the repeated holding. *Kennedy v. Rosier*, 71 Iowa, 671; *Geyer v. Douglass*, 85 Iowa, 93; *Parker v. Des Moines Assn.*, 108 Iowa, 117; *Lynch v. Dugan*, 129 Iowa, 243. Appellant has shown great persistence of error as to the date of this judgment. His argument in resistance to the motion to dismiss advises us that the judgment appealed from was entered July 18, 1909.

The ground of dismissal in the district court was that the plaintiff had failed to serve his notice of appeal upon the petitioners for the drainage improvement. The plaintiff did file a proper notice of appeal with the county auditor together with a bond duly approved by the auditor, all in strict accord with the requirements of section 1989-a6 and section 1989-a14 (Code Supplement). This was a sufficient service. *In re Jenison*, 145 Iowa, 215; *Shaw v. Nelson*, 150 Iowa, 559.

It should be said for the trial court that in entering the order of dismissal it followed the case of *Farley v. Hamilton County*, 120 N. W. 83. A rehearing was granted

1. APPEAL: notice:  
failure to state  
date of judgment.

2. SAME: appeal  
to district  
court: notice:  
service.

in the cited case which had the effect to set aside that opinion. That opinion followed *Henderson v. Calhoun County*, 129 Iowa, 119. It was overlooked that the statute had been amended since the *Henderson* case had been decided. That fact was brought to our attention in a petition for rehearing in the *Farley* case which was promptly sustained. That case was subsequently decided upon its merits. 144 Iowa, 476.

For the reason indicated, the judgment below must be, and it is, *reversed*.

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MARCY C. ENGLE, Appellant, v. PERRY ENGLE, Appellee.

**Divorce:** ADULTERY: PROCURING OF EVIDENCE: CONNIVANCE. Either a husband or wife, having reason to believe the other guilty of adulterous relations with a stranger, may take measures to secure evidence of that fact without being guilty of either connivance or consent to the wrongful act. In this case the plaintiff's acts in securing evidence of the adulterous relations of the defendant with another were not such as to bar her right to a divorce on that ground.

*Appeal from Jasper District Court.*—HON. K. E. WILCOCKSON, Judge.

THURSDAY, DECEMBER 14, 1911.

SUIT in equity for a divorce. Decree dismissing plaintiff's petition, and she appeals.—*Reversed* and *remanded*.

*E. J. Salmon* and *E. M. S. McLaughlin*, for appellant.

*J. C. Hawkins*, for appellee.

DEEMER, J.—Plaintiff and defendant were married at Des Moines, Iowa, April 12, 1905, and they lived together as husband and wife down to October 10, 1908. They had each been married before, and at the time of trial plaintiff was fifty-four and defendant something like seventy-two years of age. Defendant is a physician and surgeon, and has been engaged in the practice of his profession something like forty years. So far as shown, the parties lived happily together until plaintiff discovered, as she thought, defendant's infidelity and breach of his marriage vows. Becoming suspicious of defendant, she employed a detective to watch him, and through his efforts discovered such proof of defendant's faithlessness that she left him, and brought this action for divorce based wholly upon the ground of adultery. Thereafter defendant brought action against plaintiff for a divorce based upon the ground of cruel and inhuman treatment. In this action plaintiff filed an answer and cross-petition; in the latter she asked for a divorce from the plaintiff, the defendant herein, upon the same grounds as in her original petition. When the original case was reached for trial, the two actions were consolidated and tried together, resulting in a decree dismissing each petition, and plaintiff's cross-petition to defendant's petition in the second action, and taxing the costs in each action to the plaintiff therein. Plaintiff in the original action and defendant in the second suit appeals. The defendant in this action seems to have been content with the decree below, for he did not appeal. The only question for our consideration is the sufficiency of the testimony to establish the allegations of plaintiff's petition wherein she charges that defendant committed adultery with the woman named as corespondent.

This woman is an unmarried woman, something like forty years of age at the time of the trial. That she was something more than defendant's patient is abundantly established by the testimony, and we are constrained to

hold that plaintiff has established by a fair preponderance of the testimony the charges made by her as a ground for divorce. We might, perhaps, accept defendant's explanation of all matters charged against him, except what is known in the record as the "haymow" transaction. As to that, the testimony is overwhelmingly against him, and the most of it comes from apparently respectable and trustworthy witnesses. The explanation of this as given by the defendant and the corespondent is not entirely consistent; and to our minds entirely inadequate and contrary to all human experience. It is true that plaintiff, having had her suspicions aroused, deliberately planned to catch the parties in *flagrante delicto*. This she did by adopting the usual ruse of going away from home, yet remaining near at hand, and keeping watch over the defendant and his paramour. The scheme seems to have been so successful that thereafter defendant never returned to his home after the incident related by the witnesses, except on one occasion, when, with some other parties, he came to take away some of his personal belongings. Defendant not only denies that he ever committed adultery, but he alleges that, if he did, plaintiff consented thereto, and is not entitled to make complaint thereof. These positions are manifestly inconsistent. One or the other can not in the nature of things be true.

Having found that defendant is guilty of the charge made against him, it is permissible, however, for the claim to be made on his behalf that the plaintiff either consented to the wrong or so connived at bringing it about that she can not complain. *May v. May*, 108 Iowa, 1. But something more than maintaining a watch or hiring others to do so is necessary to establish either connivance or consent. *Robbins v. Robbins*, 140 Mass. 528; *Cairns v. Cairns*, 109 Mass. 408; *Cochran v. Cochran*, 35 Iowa, 477.

If either husband or wife suspects the other of having adulterous relations with a stranger, he or she may take

measures to secure proof to be used in an action for divorce without being guilty of connivance. *Wilson v. Wilson*, 154 Mass. 194 (28 N. E. 167, 12 L. R. A. 524, 26 Am. St. Rep. 237).

No such connivance is shown as to justify a court in denying plaintiff a divorce. It is enough to state our conclusions without quoting from the testimony upon which they are based. To set out the evidence at length would be to reproduce and make of record a history of marital perfidy which had better be forgotten. To embalm it on the pages of our reports would be of no benefit either to the parties directly concerned or to the general public. It is enough to say that to our minds the plaintiff has clearly made out her case, and, if the circumstances are to be believed, there is no escape from the conclusion that defendant had not only the disposition and the opportunity, but that he in fact was guilty of adultery with the woman named as his paramour. We do not overlook the fact that the trial court refused the divorce. But we have no means for knowing why this result was reached. It may have been under a misapprehension as to the law; but, however this may be, we can not overlook the testimony which tends more strongly to establish adultery than in many cases heretofore before this court in which divorces upon that ground have been rendered. See, among others, *Names v. Names*, 67 Iowa, 383; *Carlisle v. Carlisle*, 99 Iowa, 247; *Inskeep v. Inskeep*, 5 Iowa, 204.

The decree must be reversed, and the cause remanded for one in harmony with this opinion.—*Reversed and remanded.*

FRANK E. DOLPH, Plaintiff, v. JAMES E. CROSS, Defendant, SHENANDOAH NATIONAL BANK, Garnishee and Appellees, R. E. ANDERSON, Intervener and Appellant.

**Garnishment:** INTERVENTION. A third person claiming a garnished  
1 fund may intervene in the garnishment proceeding and assert his right thereto, even after judgment has been entered in the principal action in aid of which the garnishment was made.

**Same:** ANSWER OF GARNISHEE. It is not only the right but the duty  
2 of a garnishee to disclose all the facts within his knowledge bearing upon the ownership of the garnished funds.

**Same:** SPECIAL BANK DEPOSITS: PRIORITY OF RIGHT THERETO. Where  
3 a bank deposit is made for the purpose of meeting checks already drawn against the same and the bank officials are so informed, it becomes a special deposit, to which the check holders for whose benefit it was made, have a superior right to that of a garnishing creditor of the depositor; as a deposit of that nature does not make the bank merely a debtor of the depositor.

*Appeal from Shenandoah Superior Court.*—HON. GEORGE H. CASTLE, Judge.

THURSDAY, DECEMBER 14, 1911.

THIS is a garnishment proceeding under execution. The execution plaintiff sought to reach a fund in the bank to the credit of the defendant, and garnished the bank. The intervener appeared and claimed a part of the fund. The garnishee paid the money into court. The petition of intervention was struck from the files upon motion of the plaintiff and a judgment entered for plaintiff condemning the fund. The intervener appeals.—*Reversed.*

*Jennings & Mattox*, for appellant.

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*E. R. Ferguson* and *C. R. Barnes*, for appellee, Frank E. Dolph.

EVANS, J.—The plaintiff was the holder of a judgment against the defendant entered in the superior court of Shenandoah. On July 5, 1910, he caused an execution to issue and to be served by garnishment of the Shenandoah National Bank. Return of the execution was made on September 9, 1910. The return stated that the execution was served “by garnishing said bank and taking answer to same in which they claim that they hold \$132.52.” The following answers of garnishee were attached to the return: “A. First. Are you in any manner indebted to the defendant in this suit, or do you owe money or property which is not yet due? If so, state particulars. Answer. \$132.52. Second. Have you in your possession, or under your control, any property, rights, or credits of the defendant? If so, what is the value of the same, and state all particulars. Answer. No.” On September 17th the garnishee bank filed an amendment to its answer as garnishee and paid the money into court. Such amendment contained the following particulars: “That before noon of the 5th day of July, 1910, the defendant, James E. Cross, above named, deposited in the said bank the sum of \$132.52, and at the time of making said deposit stated to the officer or clerk of said bank to whom he handed said money to be deposited for him that he made the deposit for the purpose of meeting checks which he had already issued as against such deposit, and that the deposit was made to take care of said checks, and thereupon the said funds were so taken and received by said bank and placed to the credit of the said James E. Cross. That later, to wit, about the opening of the bank on July 6, 1910, the intervener, R. E. Anderson, presented his check for the sum of \$40.73, dated July 5, 1910, and made by the defendant, James E. Cross, to the said intervener, R. E.

Anderson, and the same would have been paid by this garnishee, but that, previous to the same being presented, it had been garnished on execution issued in the above-entitled cause of *Dolph v. Cross*, and by reason of such garnishment was unable to take up said check, but reports the same now to this court, that this court may determine whether the plaintiff or said intervener is entitled to the amount of said check." On July 22, 1910, the intervener filed a petition of intervention. He averred therein that on July 5, 1910, he sold to the defendant a tierce of lard, and received from him a check in payment therefor on the Shenandoah National Bank, and that afterwards the "defendant, James E. Cross, deposited in the Shenandoah National Bank funds to meet said check about noon on the said date of July 5, 1910, and, upon making said deposit, informed said bank that the funds so deposited were deposited to meet the payment of checks he had already drawn." He also averred that the deposit was made as a special deposit to meet the intervener's check, and another which defendant had issued, and that his right thereto was superior to that of garnishing plaintiff.

To the amended answer of the garnishee, the plaintiff pleaded that the garnishee was estopped by its original answer from pleading the matter in the amendment. The plaintiff also filed a motion to strike the petition of intervention on the following grounds: (1) That the said petition was not filed in said cause until after the trial thereof, and after judgment had been rendered. (2) That the same does not set up any proper or valid ground of intervention.

Plaintiff also filed a motion for judgment on the following grounds: "(1) That the answer of the garnishee and the amendment thereto state no defense or reason why this amount should not be paid to the said plaintiff. (2) That the answer of the said garnishee and the amendment thereto show on their face that the said garnishee is in-

debted to the defendant, James E. Cross, in the sum of \$132.52. That the said debt is the property of the said James E. Cross, and the property of no other person, and that there is no reason why judgment should not be rendered against the garnishee in the said amount, and the same applied to satisfy plaintiff's judgment *pro tanto* against the said James E. Cross." The trial court sustained the motion to strike and the motion for judgment, and entered judgment for plaintiff as heretofore indicated. The case therefore turns wholly upon the propriety of the procedure, and upon the sufficiency of the facts pleaded to entitle the intervener to relief.

I. The first question presented for our consideration is one of procedure. Was the intervener entitled to intervene in the garnishment proceeding to set up therein his claim for the fund sought to be reached by garnishment? It is argued by appellee that no such right exists where the garnishment is under execution. It is also argued that there can be no right of intervention after a judgment has been entered. This position can not be sustained. The intervention had nothing to do with the merits of the main case. It had to do with the garnishment proceeding only. This proceeding is in its nature auxiliary to the execution. Sections 3935 to 3953, which constitute chapter 2 of title 19, deal with the subject of garnishment as related to attachment proceedings. The following chapter deals with the subject of executions, and contains the following:

Sec. 3975. Garnishment. Property of the defendant in the possession of another, or debts due him, may be reached by garnishment.

Sec. 3976. Proceedings by garnishment on execution shall not be affected by its expiration or its return. Where parties have been garnished under it, the officer shall return to the next term thereafter a copy of the execution with all his doings thereon, so far as they relate to the garnishments, and the clerk shall docket an action thereon

without fee, and thereafter the proceedings *shall conform to proceedings in garnishment under attachments as nearly as may be.*

Section 3953 provides: "An appeal lies in all garnishment cases at the instance of the plaintiff, the defendant, the garnishee or an intervener claiming the money or property."

It is manifest from the foregoing that the statute provides an opportunity for issue as to the respective rights of claimants to a garnished fund. It was so held expressly in *Edwards v. Cosgro*, 71 Iowa, 296. Appellee urges that it was held otherwise in *Ball v. Creamery Co.*, 98 Iowa, 184. An examination of that case does not sustain the contention. That case did not involve a garnishment proceeding at all. An execution was levied, not by garnishment, but by the seizure of property. It was held that the garnishment statute did not apply, and that there was no pending proceeding in which an intervention could be had. We hold, therefore, in this case that the intervener presented his claim by proper procedure.

We may say, also, in this connection that there was nothing in the original answer of the garnishee bank that was inconsistent with the particulars detailed in the form of an amendment to its answer. It was the duty, as well as the right, of the garnishee to disclose all facts within its knowledge bearing upon the ownership of the funds sought to be reached. *Seymour v. Aultman*, 109 Iowa, 297.

II. Upon the facts appearing in the pleadings, was the right of the intervener superior to that of the garnishing creditor? We think this question must be answered in the affirmative. The facts pleaded show that the execution defendant made the deposit for the specific purpose of meeting the checks which he had just issued, and this fact was made known to the bank officials at the time of the deposit. The

2. SAME: answer  
of garnishee.

3. SAME: special  
bank deposits:  
priority of  
right thereto.

form of the bookkeeping was not controlling. That was a mere matter of convenience. The bank officials understood that they received this money for the express purpose of paying checks already issued for that exact amount. Whether the facts pleaded show an equitable assignment to the check holders we need not determine. The deposit was special, and not general. It was made for the benefit of the particular check holders. The bank received it as such. It is enough to say that the contract of deposit was made for the benefit of third parties, and that such third parties were entitled to avail themselves of it. If the bank itself had been a creditor of the depositor, it could not have applied such deposit upon its own claim. We see no reason for holding that the right of a garnishing creditor could rise any higher than that of the bank itself if it were a creditor. The appellee relies upon the Negotiable Instruments Act, which provides that "a check of itself does not operate as an assignment of any part of the funds to the credit of the drawer with the bank, and the bank is not liable to the holder unless and until it accepts or certifies the check." Code Supplement, 3060-a189. This section does not cover the situation here presented. The intervener is not relying upon the "check of itself." He bases his claim, not only upon the check, but upon the further fact that a special deposit was made to meet this very check after the issuance thereof. The bank, having received the deposit for such specific purpose, was bound by the conditions imposed. The recent case of *Smith v. Sanborn State Bank*, 147 Iowa, 640, presents a situation where a depositor made a special deposit to his own credit for the purpose of checking thereon in payment of certain contemplated hospital expenses for the benefit of his wife. The bank as a creditor of depositor applied the deposit upon the past-due note of the depositor. We held that such application was a breach of the contract and a misappropriation of the fund. Somewhat in point also are

the cases of *What Cheer Savings Bank v. Mowery*, 149 Iowa, 114; also, *Hove v. Stanhope State Bank*, 138 Iowa, 39.

We reach the conclusion that the deposit in question was special, and not general, and that it did not create the mere relation of debtor and creditor between the bank and the depositor in the ordinary sense, and that the right of the check holders, for whose benefit it was deposited, was superior to that of the garnishing creditor, and that the claim of the intervener thereto to the amount of his check should have been sustained.

The judgment below must therefore be *reversed*.

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C. H. BRAMLEY v. GEORGE V. JORDAN, Appellant.

**Drainage:** DIVERSION OF STREAM: INJURY TO DOMINANT ESTATE: IN-  
1 JUNCTION. The owner of a servient estate can not rightfully construct a dam in a stream on his own land so as to cast the water back onto the dominant estate to the injury of the same; and where this is the effect the owner of the dominant estate may restrain a continuance of the dam, even though its purpose was to divert the water of the stream and thus to reclaim land of the servient owner.

**Same.** The right of a dominant proprietor to have the water leave  
2 his estate at its lowest level is a corporeal right which he is entitled to enforce.

*Appeal from Crawford District Court.*—HON. Z. A. CHURCH, Judge.

THURSDAY, DECEMBER 14, 1911.

SUIT to enjoin defendant from obstructing the waters in a watercourse resulted in a decree as prayed. The defendant appeals.—*Modified and affirmed.*

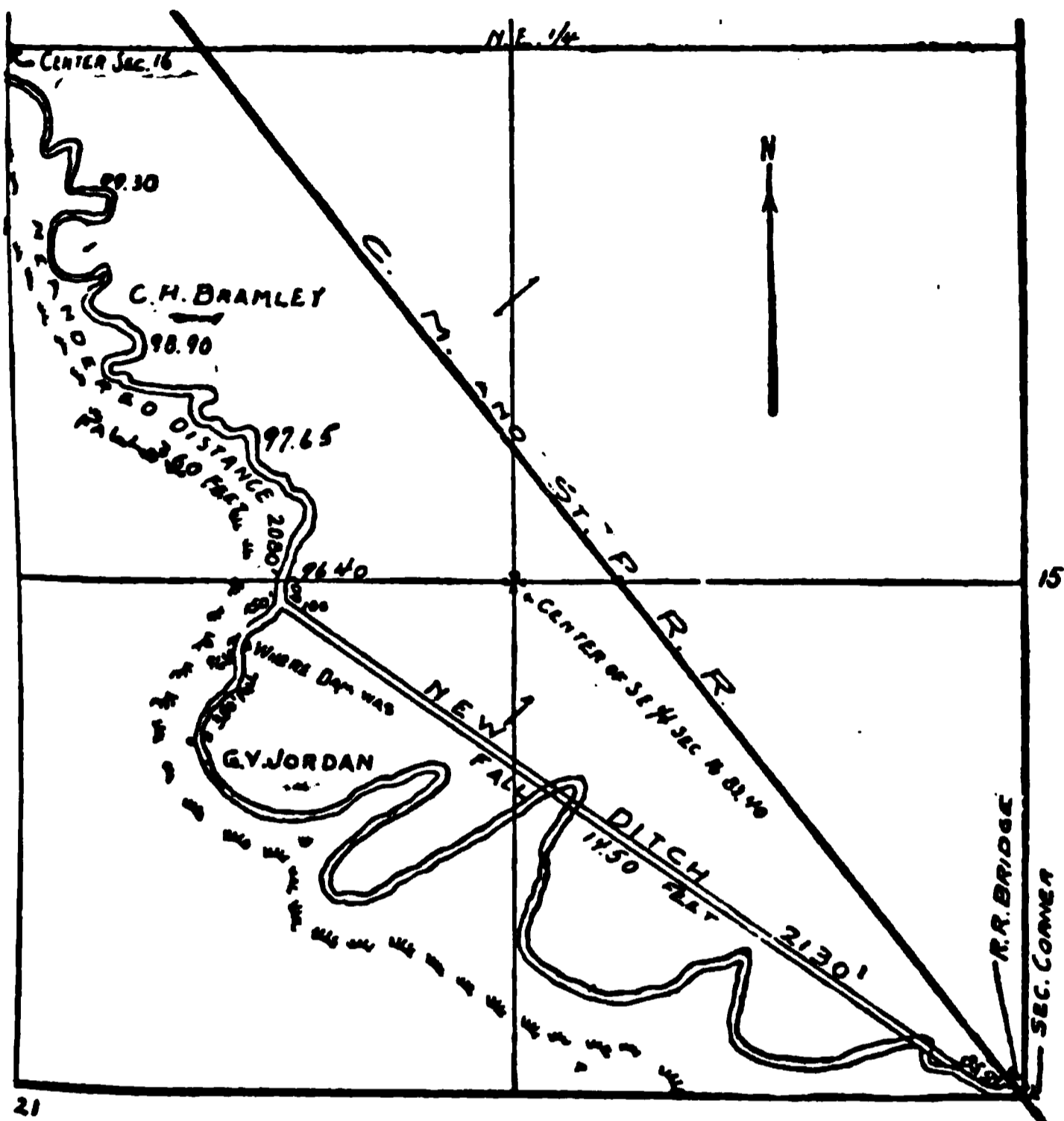
*Geo. A. Richardson and Shaw, Sims & Kuehnle, for appellant.*

*Conner & Lally, for appellee.*

LADD, J.—Plaintiff owns the N.  $\frac{1}{2}$  and the defendant the S.  $\frac{1}{2}$  of the S. E.  $\frac{1}{4}$  of the section. Through this quarter, the Chicago, Milwaukee & St. Paul Railroad extends from about forty rods east of the northwest corner to a point a little west of the southeast corner. Southwest of the railroad is a watercourse known as West Paradise Creek, entering the quarter five or six rods south of the northwestern corner, and running southeasterly out beneath the railroad bridge near the southeast corner. The banks of this stream are six or seven feet deep, and ordinarily the water was from six inches to a foot deep, and three or four feet wide at the bottom, which was hard with some gravel. In 1907 the defendant cut willow, ash and brush, and threw these into the creek with butts up stream its entire course through his land, with the exception of about one hundred feet, and later excavated a ditch in a direct line from a point a short distance below the division fence two thousand one hundred feet to near the railroad bridge. To force the water into the ditch he constructed several dams, one of which was immediately below the upper end of the ditch.

About fifteen acres of plaintiff's land east of the creek are cultivated, and ten or twelve acres west of it are used for pasture, and there was a ford just north of the partition fence where his cattle drank and crossed the stream. The effect of the defendant's improvements was to back the water on plaintiff's land, retard its movement, fill the ford with debris and mud several feet deep, so that the cattle could not drink or cross there without danger of miring, and, at times of freshets, to overflow his field and pasture.

The situation is shown on the accompanying map:



Instead of excavating an adequate ditch, the defendant plowed a furrow along the line of the proposed ditch and dug this out, so that it was about eighteen inches deep and eighteen inches wide where he intended to take the water from the stream. The dams and other obstructions held the water back, forcing it through the ditch, and this washed out the ditch gradually, and, of course, mud and debris settled in the bottom of the stream above to the depth of several feet. An engineer testified at the hearing in April, 1909, that the upper end of the ditch was then four feet higher than the old bottom of the channel and one foot higher than the bottom was at that time. An opening in the upper dam was made after the action had been commenced, and, after evidence showing the facts as

recited had been adduced, at the April, 1909, term of court the parties stipulated that the cause be continued over the term, in consideration of which the defendant undertook to "so deepen and widen the ditch, now on said land constructed by him, as that it will furnish an outlet for the flow of the water from the Bramley land and equal to the outlet that was there before any obstructions were placed in the old channel by Mr. Jordan, and Mr. Jordan is given until the first day of August to complete the ditch. Mr. Jordan is not to fill the dam or in any way to lessen its capacity to carry water." The hearing was resumed at the November term of court following, when it was shown that in May defendant had put in a dam about thirty-five rods below the partition fence, and on the 24th day of June had erected a dam immediately below the north end of the ditch; also, he removed two spades of earth from the bottom of the ditch, about three feet, and, as these dams turned the waters into it, the flow deepened and somewhat widened the ditch. But, according to the evidence of several witnesses, the bottom of the ditch was still several feet above the original bottom of the creek. One of these made measurements from which it appeared that the ditch at the mouth was five feet wide at the top, one foot at the bottom, and five feet eight inches deep, and the mud accumulated above five feet four inches deep. In the ditch the water was two and one-half feet deep and three feet wide at the top, while above it the water was from eight inches to a foot deep and seventeen feet wide up to the division fence and about thirteen feet wide beyond. Other witnesses confirmed the accuracy of these measurements, though by estimates. It also appeared that, after the construction of the dams at the time of a freshet, the water backed over plaintiff's pasture, thereby leaving much debris thereon, destroying the feed. The defendant in his testimony conceded that the upper dam may have raised the water six inches or a foot, but this was to turn it into

the ditch, so that in digging he could leave the bottom on an incline. He testified that the ditch as now constructed carried all the water of the stream above, and was adequate to do so when the flow is normal, that at no place is the bottom less than three feet wide, and, in substance, that the level of the creek bottom has not been raised, and that for more than a year all water from its intersection with the ditch about thirty-five rods south of the line had flowed through the ditch. Such, in substance, was the evidence on which the district court based its decree directing the removal of all obstructions in the old channel through defendant's land, save that it was shown that there was a fall of fourteen and five-tenths feet from the mouth to the outlet of the ditch, and that the fall in the course of the stream in plaintiff's land was less than four feet.

There is no dispute but that the ditch from the lower intersection to the railroad bridge is adequate to carry off the water, and for this reason, in so far as the dams at that point or below are interfered with, the decree should be modified. But the evidence indicates by a clear preponderance that from there to the north end of the ditch it was inadequate to carry away the water so as to avoid raising the water in the stream on plaintiff's land and injuring it. Manifestly the defendant's design was to so adjust conditions as that an adequate waterway through his land should be excavated in large part by the action of the waters. While this has the merit of being economical from his point of view, he can not be permitted to carry it out if it will result in undue injury to his neighbor. The circumstance that it will reclaim and render tillable many acres on his land, and is in the interest of good husbandry, furnishes no justification for backing the waters on plaintiff's land to its material injury. It is well settled that any swelling of the stream over the line by the construction of dams on the servient estate is an invasion of the rights

1. DRAINAGE:  
diversion of  
stream: injury  
to dominant  
estate: in-  
junction.

of the upper owner, who has the right to the stream in its natural condition. This means that in which the stream is, under the ordinary operation of the physical laws which affect it. This may be different at different seasons of the year, and yet be ordinary by the recurrence of the same condition about the same season each year. *Dorman v. Ames*, 12 Minn. 451 (Gil. 347); 2 Farnham on Waters, section 546. The mere raising of the water in the stream on the dominant estate by backing it over the line is a trespass for which the owner may seek redress from the courts, and, according to the weight of authority, it is not necessary to show special injury in order to maintain the action. This is on the theory that the upper proprietor has a right to protect himself from the acquisition of prescriptive rights at least, and that the right is not diminished by the fact that he has no present use for his rights to their full extent. 2 Farnham on Waters, sections 551, 571. But in the case at bar not only the raising of the water above the line was proven, but the filling of the ford with mud and the covering of the pasture with debris, thereby working a direct injury to the land, so that it is not necessary now to inquire whether relief in the absence of injury is available. The contention of appellant to the contrary is against the clear preponderance of the evidence, and it is unnecessary to proceed on the theory either that the improvement was completed, or that it occasioned no injury to plaintiff's land. Undoubtedly the fall was such that the ditch could have been so excavated as to have proven sufficient, but such was not the defendant's purpose. His scheme was to force the water to do this, even though the dams necessary to accomplish his purpose raised the water above the line to the injury of the dominant estate.

The complaint is not as in *Pohlman v. Railway*, 131 Iowa, 89, that by the velocity of the flow the injury was wrought, but that the owner of the servient estate by his

improvements was preventing the water in the stream from leaving the dominant estate at its lowest level. To have it so to do is a corporeal right, a part of the premises. *Scriver v. Smith*, 100 N. Y. 471 (3 N. E. 675, 59 Am. Rep. 224), which the courts will protect. All counsel has said concerning the interests of good husbandry may be conceded, but this is not in point, for the question is not whether defendant may not properly straighten out the water-course, but whether in doing so he has not interfered with plaintiff's rights by raising the water level in the stream on his land. The evidence quite satisfactorily so shows, and therefore the decree requiring the removal of the obstructions in the old channel from the mouth of the ditch down to its intersection with such channel about thirty-five rods south of the division line has our approval. The decree will be so modified as not to require change in the old channel below such intersection.

It should be added that, upon a clear showing that the ditch has been so widened and deepened as to be adequate to carry off the water so as not to raise the water level at the line as it was originally, this decree may be modified. Without the aid of a competent engineer, it would seem that, in view of the fall of fourteen and five-tenths feet in so short a distance, the situation might readily be remedied without great expense. Costs will be taxed to appellant.—*Modified and affirmed.*

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JOHN R. REAM, County Treasurer of Lucas County, v.  
J. A. BROWN, Appellee.

**Taxation:** ASSESSMENT OF OMITTED PROPERTY: DEFAULT: VACATION: APPEAL. Where a county treasurer has listed alleged omitted property for taxation, and on the day set for hearing and before any steps have been taken to enforce payment of the tax he

becomes convinced that the assessment is erroneous, or is informed that the taxpayer is present before him desiring to show cause why the listing and assessment should not be made, he may, even after entry of default, reopen the matter for further hearing. And where the treasurer, as in this case, had gone through the form of entering default, but the taxpayer shortly afterward appeared and offered his objections to the assessment, which were received, filed and considered, the proceeding amounted to a reopening of the matter; and the action of the treasurer in thereafter affirming the assessment constituted a finding from which the taxpayer was entitled to appeal.

*Appeal from Lucas District Court.*—HON. D. M. ANDERSON, Judge.

THURSDAY, DECEMBER 14, 1911.

THE opinion states the case.—*Affirmed.*

*Williams Collinson*, County Attorney, *E. F. Richman* and *Penick & Anderson*, for appellant.

*Stuart & Stuart*, for appellee.

WEAVER, J.—In January, 1910, a so-called “tax ferret” in the employ of Lucas county filed with the county treasurer information to the effect that a large amount of personal property, money, and credits belonging to J. A. Brown, and taxable in said county, had been omitted from the assessment for the years 1905 and to 1909, inclusive. This information specified some two hundred and forty different items of the aggregate valuation for each year of about \$450,000. In addition to these items, there was made the further claim of other omitted moneys and credits, not specifically itemized, to the amount of \$300,000 for each of said years.

On January 11, 1910, a notice, by registered letter, was sent to Brown, to the effect that the treasurer had

been apprised that property belonging to him and liable for taxation for the years named had been omitted from the assessment, and notifying him to appear at the treasurer's office at 10 o'clock a. m. of January 24, 1910, and make his objection, if any he had, to the listing of such omitted property by the treasurer. The notice did not specify or describe the alleged omitted property which it was proposed to list, but stated the gross value for each year upon which it was proposed to place a tax.

On January 17, 1910, Brown appeared before the treasurer and demanded an itemized statement of the property claimed to have been omitted from assessment, but was given only a list of aggregates for each of the years in question, without itemization or specification of the particular property alleged to have been omitted.

On the morning of January 24, 1910, and before 10 o'clock, Brown went before the treasurer, and, insisting that he was not liable for the tax claimed, asked for further time to make a showing in support of his defense. Concerning what occurred thereafter during that day there is some dispute and uncertainty, and particularly as to the hour or time of the successive steps taken by both parties. The following, however, is reasonably clear: The treasurer was not willing to consent to a postponement to another day, and Brown went out of the office with the expressed purpose of obtaining an attorney and making resistance to the assessment. He did not get back until about 11 or 12 o'clock; the exact time being in dispute. It is now claimed by the treasurer that at 11 o'clock some sort of "default" was entered up against Brown, and tax assessed as demanded by the ferret, who, it would seem, was allowed to perform this part of the treasurer's duties. Within a few minutes thereafter Brown appeared with counsel, and with formal written objections to the proposed assessment, which he wished to file, and asked that time be given to prepare for trial. Neither the treasurer nor the ferret informed

them that a default had already been entered. The treasurer's own testimony in this regard we quote from the record as follows:

Why, Mr. Stuart appeared on that day. That was about 12 o'clock, and he came in, and I made the remark it was little late for objections, but I said personally, myself, that I was willing that Mr. Brown should have a fair chance; that it made no difference to me. Personally, I was willing that Mr. Brown should have a fair trial and a fair chance in the matter, and that he should make his objections; and he made his objections, and I accepted them, and told him that I would file them, which I did. I remarked to him, in substance, that the parties will have to fight out this matter in court, and I thought I would have to make the assessment, and told him, after reading the objections, that I would make the assessment anyway. I would have to make the assessment anyway. I believe I said that Mr. Brown could fight the matter out in court. I believe that I said that. No; I didn't inform Mr. Stuart at the time that I had entered up a default.

Thereafter, on the same day, Brown was notified by registered letter that he had been assessed for the payment of omitted taxes to the amount of \$54,500.77, and from this assessment and taxation he appealed to the district court on January 27, 1910. On the following day (January 28, 1910), the treasurer signed a record or written statement, prepared for him by the ferret, as follows:

Additional Finding of Treasurer. In this case, it appearing that the said J. A. Brown, by his attorneys, Stuart & Stuart, did, on the 24th day of January, 1910, at 12 o'clock noon of said day, file an answer or objections in response to the notice from the treasurer, which notice stated that the time of hearing objections to the proposed listing and assessment of omitted property to the said J. A. Brown was 10 o'clock a. m. of said 24th day of January, 1910, and thereafter, to wit, on the 27th day of January, 1910, the said J. A. Brown, by Stuart & Stuart, filed an additional answer or objections to the listing and assessment of omitted property to the said J. A. Brown,

in both of which said answers or objections the said J. A. Brown objects to the listing and assessment of any property to him, omitted for the years 1905, 1906, 1907, 1908, and 1909. Now, on this 28th day of January, 1910, the said treasurer, having duly considered said answers or objections, finds that the same are insufficient, and would have been insufficient, even had they been filed before default, and before assessment was made. That, had they been filed in time to consider before default was entered and assessment made, they would have been and are now overruled, and the treasurer now finds that the assessment, as made by him on January 24, 1910, against the said J. A. Brown, for property omitted from assessment for the years 1905, 1906, 1907, 1908, and 1909, is in due form of law and regular and herewith refuses to change the said assessment on the showing made in the answer or objections filed in this case January 24, 1910, at 12 o'clock noon, and on January 27, 1910, respectively, or either of them. (Signed) J. P. Ream, County Treasurer.

The appeal being docketed in the district court, the treasurer filed a transcript of the proceedings had before him, and moved that the assessment so made and reported be confirmed, on the ground that no objections thereto had been made or filed in proper time by Brown; and that there was therefore no issue to be tried, and the court was without jurisdiction to consider objections thereafter made. Thereupon Brown moved to require the treasurer to file an amended transcript, showing material matters alleged to have been omitted from his first transcript. The record seems to indicate that at this stage of the proceedings evidence was heard and the treasurer sworn and examined as to the proceedings before him, and the showing thus made was treated as in the nature of an amended transcript. On the showing thus made, the motion to affirm the assessment was overruled, and the cause was ordered set down for trial on its merits. From this order the treasurer appeals.

The ruling of the trial court is too manifestly right

to justify us in any extended discussion of the case. On the appellant's own showing that when Brown appeared with his counsel, shortly after the hour fixed in the notice, they were told that, while they were a little late, the treasurer was willing they should have a fair trial, and thereupon permitted them to file their objections to the proposed assessment, the so-called "default," if any, had been entered, was opened up, and the objections were just as effective as if they had been filed before the hour of 10.

If a treasurer has listed alleged omitted property, and on the same day, and before any steps are taken for its collection, he becomes convinced that the entry is a mistake, or he ascertains that the party so charged is present before him, desiring in good faith to show cause against such listing, we find no reason in the statute or in general principles of right and fair dealing for denying his authority to reopen the matter for further hearing and consideration. In any event, this, in substance, is just what appellant did do. He did not disclose to Brown or his counsel that he had gone through a form of entering a default, but gave them to understand that, while, perhaps, they were a little tardy in appearing, he did not propose to insist upon the objections, but was ready to receive the same and give them fair consideration. He did receive, file, and consider them, and thereupon announced that he would have to make the assessment as demanded by the ferret. If this is not a finding and assessment from which an appeal will lie, it will be difficult to frame one. The record so made discloses the claim made by the ferret and treasurer, the answer thereto by the party sought to be charged, and the decision, overruling the objections, and declaring the property subject to assessment. This is all which can be done in any case of contested assessment of omitted property, and if the property owner may not appeal therefrom the statute allowing appeals may as well be abrogated. To permit that right to be defeated by a concealed "default," entered

between the appearance of the taxpayer in the morning and his appearance an hour later with his counsel, armed with formal answer and objections, which are received and filed with the assurance of a fair trial, would be too gross a perversion of justice to receive the approval of any court.

The appellee is sought to be charged with the payment of a sum amounting to a very respectable fortune, on the theory that he has evaded taxation. He joins issue on the claim, and asks a hearing. To this he is entitled. We know nothing of the merits of the controversy. The demand may be entirely just; it may be just in part only; and it may be wholly unjust. The order appealed from does no more than to open the door of the court for the trial and determination of the fact. Indeed, if it were necessary for us to go into that question, we should be compelled to find from the record that the so-called default was not in fact entered, and no tax against the appellee on omitted property was in fact placed upon the treasurer's books until after appellee had appeared with his counsel and made formal objection to the listing; but we do not care to further review the facts. Enough has been shown to disclose an assessment, or listing, from which an appeal is provided, and that appellee did appeal in due season, thus bringing the case to the district court for disposition upon its merits, and this is all that is required to insure the property owner a hearing.

As the question of the appealable character of the trial court's order, refusing to confirm the assessment, and setting the case down for trial, has not been raised, we do not discuss or decide it.

The rulings complained of were right, and they are *affirmed*.

## STATE OF IOWA v. RAY MCGHUEY, Appellant.

**Criminal law: RAPE: EVIDENCE: SUFFICIENCY.** On this prosecution  
1 for rape the evidence is reviewed and held sufficient to warrant a  
conviction for assault with intent to commit rape.

**Same: MISCONDUCT IN ARGUMENT.** On a criminal prosecution the  
2 question of punishment in case of a verdict of guilty is not a  
matter for the consideration of the jury, and it is improper for  
counsel in argument to discuss the question; as the duty of the  
jury is simply to determine the guilt or innocence of the defend-  
ant. And where counsel improperly refer to the severity of the  
punishment as an argument against conviction, the jury should  
be told to give the statements no consideration.

**Same: EVIDENCE: COMPETENCY.** The testimony of prosecutrix that  
3 after the commission of the offense she was deeply grieved was  
not prejudicial to the defendant, as it in no manner tended to  
connect him with the crime.

**Same.** Evidence that prosecutrix told her parents that defendant  
4 had raped her was not objectionable as a conclusion; since it  
was no more than a statement that intercourse with her had  
been accomplished by force, which is competent.

**Same: EVIDENCE OF COMPLAINT: ADMISSIBILITY.** It is only the volun-  
5 tary complaint of a prosecutrix for rape that is admissible to  
strengthen her testimony; but where the statement was made in  
response to an inquiry under circumstances clearly indicating that  
she had already made complaint and the inquiry simply called  
for a verification of its truth, or the inquiry merely anticipated  
a statement which the complainant was about to make, it is not  
rendered inadmissible by the fact that the questioner happened  
to speak first.

**Same: CORROBORATION: INSTRUCTION.** In this action the jury was  
6 told that the defendant could not be convicted on the uncor-  
roborated testimony of the prosecutrix, but that it was not nec-  
essary to prove the act by other direct testimony, and that neither  
evidence of complaint nor physical injury were sufficient cor-  
roboration, but admissible to support her testimony. *Held*, that  
the instruction did not in effect direct that such evidence con-  
nected defendant with the commission of the crime. And it is

further held that the instruction was not objectionable in that it told the jury in effect that independent evidence had been introduced tending to connect defendant with the offense.

**Same: TRIAL: REMARKS OF COURT.** While it is not the province of  
7 the court in a criminal case to express to the jury any opinion on the guilt or innocence of defendant, or to attempt to coerce the jury into rendering a verdict, still where it appears that the jury hesitates about returning a verdict because of the possible severity of the punishment in case of conviction, it is proper for the court to advise them that their only duty is to determine the guilt or innocence of the defendant, that the question of punishment is purely a matter for the court, and to urge upon them the desirability of agreeing upon a verdict. In the instant case the court's remarks indicate no intention to coerce the jury or to express any opinion on the question of defendant's guilt, and could not have been so understood.

**Same: RECEPTION OF VERDICT: ABSENCE OF ATTORNEY.** The statute  
8 only requires the presence in court of the defendant when a verdict is returned in a felony case; so that absence of his attorney is not ground for error, where no request was made that he be present.

*Appeal from Ringgold District Court.*—HON. H. M.  
TOWNER, Judge.

THURSDAY, DECEMBER 14, 1911.

THE defendant was convicted of the crime of assault with intent to commit rape, and appeals.—*Affirmed.*

*Fuller & Fuller and Miles & Steele*, for appellant.

*George Cosson*, Attorney-General, and *John Fletcher*,  
Assistant Attorney-General, for the State.

SHERWIN, C. J.—I. In the evening of June 12, 1910, Dottie Mickaels, who was then not quite sixteen years old, and lived with her parents on a farm, took part in public exercises which were held in Salem Church, a rural church situated about half a mile east of her father's home. At

the conclusion of the exercises, the defendant asked Dottie Mickaels if he might accompany her to her home, and upon her assent thereto they entered the defendant's buggy, and started from the church in the direction of her father's house. So far there is no dispute in the record. The Mickaels house stood some ten rods from the main road, and was reached through a lane, and Miss Mickaels testified that the defendant drove past the lane, and stated that he would drive down to the next corner and turn around; that when they got to the corner indicated she asked him to turn around and go back, but that he refused to do so; and that he finally took her to a point several miles away from her home, where he had sexual intercourse with her by force and against her will. On the other hand, the defendant testified that he did not drive beyond her home; that when they reached the lane leading from the road to the house they stopped and talked a few minutes; and that he then drove on up to the house and left her. Counsel for appellant earnestly contend that the evidence is insufficient to sustain the conviction, and it is perhaps better to consider the matter in this connection. That this young girl was forcibly defiled by someone between the time that she left the church with the defendant and the time that she entered her father's house two or three hours thereafter does not admit of doubt. It was between 10 and 10:30 o'clock when the defendant and Miss Mickaels drove away from the church that night, and, while the record does not disclose the exact time that she reached her home, it may fairly be inferred from the evidence as a whole that it was around midnight. When she went into the house her father and mother and the other members of the family had gone to bed, and she at once went to her room, and did not see her mother or father until the next morning. But the next morning, between 5 and 6 o'clock, she saw both of her parents, and soon thereafter, and as soon as

1. CRIMINAL LAW:  
rape: evidence:  
sufficiency.

her father had left the house, she told her mother what had occurred while she was with the defendant the night before. She then had fresh bruises on one of her arms and on one leg, and her underwear was torn and soiled in such manner as to corroborate her statement that she had been ravished. An examination by competent physicians a few days thereafter also showed that her hymen had been recently ruptured, and that her vaginal organ had been injured so recently that it was still unhealed. One of the physicians testified that the conditions present when he made the examination indicate that the injuries had been received four or five days or a week previous thereto.

The appellant urges that there is no evidence, except that of the prosecutrix, tending to show that they drove beyond the Mickaels house that night, or were where the crime is alleged to have been committed. The prosecutrix testified that during the drive before the crime was committed the carriage occupied by them was between two other carriages, and that she recognized the persons in the carriage behind them, by their voices, as the Wilson brothers. She also fixed the place where they left the company of the other carriages and turned north, which was shortly before the assault was made. The prosecutrix did not know who the occupants of the carriage ahead of them were. George Wilson testified that he and his brother were in a buggy driving along the road in question at about the time stated by the prosecutrix, and that two buggies were ahead of them for some distance; that one Ab Stevens and a lady were in the front buggy, but that he did not know who was in the buggy between his own and Stevens'. Stevens testified that he was on the same road that night; that Wilson was also there with his horse and buggy, and was the second one behind him; that the conveyance between him and Wilson was a carriage containing a man and woman; that he could not tell who they were, but that he noticed the team and harness, and a few days

after saw the defendant driving the same team. There was also other evidence tending to show that the defendant did not take the prosecutrix directly home, and that he did not reach his own home, a few miles from the home of the prosecutrix, until nearly 2 o'clock in the morning. We are abidingly satisfied that the verdict should not be disturbed on the ground of lack of evidence.

II. In his opening statement to the jury one of the defendant's counsel said: "It is a very serious crime, gentlemen, one which, if you gentlemen should find him guilty, the court would sentence this defendant to the penitentiary for life." An objection to such statement was made, whereupon the court said to the jury: "The jury will not consider any such statement regarding the punishment. Under our law, there are so many matters connected with it that it is improper for counsel to discuss those matters to the jury." There was no error in this direction to the jury. It was the jury's right and duty to pass upon the facts presented for its consideration, and, when that was done, its responsibility ceased. If the facts were such as to demand a conviction under the law and the obligation of the oath taken, the punishment provided by the law could make no difference with the discharge of the duty imposed. Furthermore, while the crime of rape may be punished by life imprisonment, the statute also provides that the punishment may be for any term of years, thus giving the trial court wide discretion in the matter of punishment, and counsel clearly had no right to assert that the court would inflict the greatest penalty possible under the law.

III. The prosecutrix testified over the defendant's objection that after going to bed the night in question she cried. The competency of the statement is at least questionable, but as no question can fairly arise as to the commission of the crime charged by some person, and as the statement did not

2. SAME: misconduct in argument.

3. SAME: evidence: competency.

tend to connect the defendant with the crime, we can not see that it was prejudicial to him.

IV. The next morning after the occurrence the prosecutrix told her mother and father that the defendant had raped her, and it is urged that such statement was a mere

4. SAME. conclusion, and should not have been received. It was clearly competent to state that intercourse had been had by force, and that was the effect of the statements in question. *State v. Barkley*, 129 Iowa, 484; *State v. Peterson*, 110 Iowa, 647; *State v. Watson*, 81 Iowa, 380; *State v. Cook*, 92 Iowa, 483.

V. When the prosecutrix first told her mother what had occurred the night before, her father had left the house for his work. As soon as the mother was informed of the transaction, however, she went out where her husband was, and told him about it. While the record is not as clear as it might be relative to the matter, it fairly appears that the prosecutrix was present with her father and mother when her mother told her father what had happened the night before, and that she heard the statement made by her mother to her father. As soon as Mrs. Mickaels told her husband what the defendant had done the night before, he asked the prosecutrix whether it was so or not. She said it was so, and that the defendant had raped her. Complaint is made of the admission of the testimony of her father as to the statement made to him at that time by the prosecutrix on the ground that it was not voluntary, and therefore not a complaint within the meaning of the law. It is undoubtedly true that a statement of the kind involved here is not a complaint within the meaning of the law, unless it is the voluntary act of the injured party. It is the voluntary recital of her wrong that is received to strengthen the testimony of a woman who claims that she has been ravished. *State v. Bebb*, 125 Iowa, 494.

But the rule is not applicable to this case, because of

the facts under which the complaint was made. Complaint had already been made to the mother, and then the mother and daughter sought the husband and father, and the mother, in the presence and hearing of the daughter, told of the wrong, and the prosecutrix, in answer to a question as to the truth of the statement, said that it was true, and then repeated the complaint that she had made to her mother, without further questioning on the part of her father. The appearance of the prosecutrix before her father at that time was entirely voluntary, so far as the record shows, and it may fairly be said that she was there for the purpose of informing him of the wrong that she had suffered; and the fact that her mother first disclosed the horrible condition to her father in no way renders her own statement to him involuntary. Where the circumstances indicate that but for the questioning there would probably have been no voluntary complaint, the answer is inadmissible. But, when the question merely anticipates a statement which the complainant is about to make, it is not rendered inadmissible by the fact that the questioner happened to speak first. *Rex v. Osborne* (1905), 1 K. B. 551; 33 Cyc. 1468, note; *State v. Dudley*, 147 Iowa, 645.

VI. The court instructed that a conviction could not be had upon the testimony of the person injured, unless she be corroborated by other evidence tending to connect the defendant with the commission of the offense, and said: "This does not mean that the state is required to prove the act by direct testimony other than that of the prosecutrix, or by eyewitnesses of the transaction. It does, however, mean that there must be other testimony than hers, a showing of other facts and circumstances than those shown by her testimony, which shall tend to connect the defendant with the act charged." It was further said in the same instruction:

6. SAME: corroboration: instruction.

Complaints made by the prosecutrix to her parents

are not alone sufficient to constitute that corroboration required by the law. Evidence of such complaints are admitted, and may be considered, as tending to confirm and strengthen the truth of her testimony. A failure by the prosecutrix to complain at once is looked upon as a suspicious circumstance, indicating that her story may be a fabrication. Hence, testimony of such complaints are admitted and may be considered as confirming or disparaging the accuracy and veracity of the prosecuting witness, and for no other purpose. Testimony that the genital organs of the prosecuting witness were injured, or the hymen ruptured, is not of itself sufficient to constitute that corroboration required by the law. Such testimony is admitted, and may be considered, as tending to strengthen the testimony of the prosecuting witness, and as evidence tending to show that a rape had been committed by someone. Evidence of bruises on other parts of the body, and of torn and soiled clothing, are not alone corroboration, for none of these may tend to connect the defendant with the offense charged. But testimony as to these may be considered as showing, or failing to show, that a crime had been in fact committed, and that resistance had been or had not been made by the prosecutrix. Opportunity is not enough of itself to constitute the corroboration required by the law. But, while mere opportunity does not of itself amount to corroboration, yet, if opportunity is shown to have been defendant's intention, if he took occasion to bring it about, and if it was with apparent deliberation, such facts, if shown, may be considered with other facts, if any are shown, tending to connect the defendant with the offense charged. Any independent testimony which has been introduced on the trial of the case which tends to identify and single out the defendant as the perpetrator of the crime charged, and which, considered in connection with the testimony of the prosecuting witness, established the essential elements of the crime as herein stated, is properly to be considered as corroborating testimony, and the sufficiency is to be passed upon by the jury.

The appellant contends that the instruction, in substance, told the jury that complaints by the prosecutrix corroborated her testimony connecting the defendant with

the crime charged. Such is not a fair or reasonable construction of the language complained of, however, for the jury was expressly told therein that evidence of such complaints could only be considered as confirming or disparaging the accuracy and veracity of the witness, and this was said after the express statement that complaints would not constitute the corroboration required by law. It is also said that the instruction told the jury that injury to the genital organs would corroborate the testimony of the prosecutrix that the defendant committed the crime. The instruction can not be fairly so construed in our judgment, and the criticism is therefore unfounded. Appellant says that there was no evidence, except that of the prosecutrix, that the defendant had the opportunity to commit the crime, or tending to connect him therewith, and because thereof that the instruction was erroneous. It is further said that the instruction, in effect, told the jury that independent evidence had been introduced tending to single out the defendant as the perpetrator of the crime charged, when clearly there was no such testimony. These three complaints are without foundation, for the evidence fully warranted the instruction complained of. And for the same reason the court rightly refused to instruct the jury to find the defendant not guilty of rape and not guilty of an assault with intent to commit rape, as requested by the defendant.

VII. The court gave a full instruction on the subject of intent and correctly defined the term; hence, there was no error in refusing the defendant's eleventh request.

After the jury had been out with the case for some time, it returned into court and reported that it was unable to agree upon a verdict, whereupon the following colloquy took place between the court and the jury:

The Court: What is the trouble, Mr. Foreman?  
Foreman Porter: Well, it seems to me that in the minds of some of the jurors that that evidence is conflicting some

way or other. They seem to think that the penalty seems to be too severe for the offense. The Court: What does the jury know about the penalty? Foreman Porter: That is something I can't understand. It is all supposition. The Court: The court is responsible in fixing the penalty, and not the jury. There is only one single question that you have to decide, gentlemen of the jury, and that, whether or not this defendant is guilty or not guilty, and that is a question that the jury only should consider. Now, gentlemen, let me say this to you: Either this defendant is guilty or not guilty. This case has been tried before you very carefully and very ably on the part of both the state and the defendant. In all probability it can never be tried as well for both parties as it has now. You gentlemen ought to return a verdict in this case. It is your duty to do so if you can possibly do so. There is no reason why you can not return a verdict in this case, because certainly you are as well qualified to do so as any jury ever will be. If you can not return a verdict, who could? Or what jury could? It is the object and purpose of the law to have these cases determined. Both the state and the defendant have been ready to submit the case. They have submitted it carefully. They have both of them done everything they possibly could to enlighten you and to make you ready and able to render a verdict in the case, and there is no reason in the world why you should not return a verdict in this case. I think it is my duty to send you again to your jury room and have you determine there what you are bound under your oath to determine; and that, being the sole and only question, is this defendant guilty or not guilty? Gentlemen, you may retire to your jury room for further deliberation.

Error in various forms is predicated on these remarks of the court, but appellant's main contention is that the jury understood from what the court said that it was its

7. SAME: trial:  
remarks of  
court.

duty to return a verdict of guilty, and not only that, but a verdict of guilty of rape.

The language used will bear no such construction, unless there be added to it independent knowledge on the part of the jury of criminal procedure, and

even then we do not think the jury could have so understood the court. It is, of course, fundamental that the court has no right to say to a jury in a criminal case that it must find the defendant guilty of the crime charged, or of any offense included therein. And where a court so far forgets its duty and the limitations upon its power as to so advise a jury, either in a direct or in an indirect way, it is the plain duty of this court to correct the error by granting the defendant a new trial to the end that the facts in his case shall be determined by a jury without any possibility of coercion on the part of the court. It will be observed that the court told the jury in the very beginning of his remarks that it was its duty to determine whether the defendant was guilty or not guilty. The further statement that he was either guilty or not guilty could not have been construed as meaning that he was guilty any more than would the fact that he was tried on the charge, for the sole and only question before both the court and the jury was his guilt or innocence. Nor could the same statement be construed as a direction to find the defendant guilty of rape, for the court had instructed that the charge of rape included assault and battery and simple assault, and the fact that the jury returned a verdict of assault with intent to commit rape negatives this contention of the appellant. The court did strongly urge the jury to agree upon a verdict, if it could do so, and that was the sole and only purpose of the trial. The jury was not put into the box for the purpose of playing with the administration of the criminal law, for the case was of the utmost importance to both the state and the defendant. Nor was the case submitted to it for the purpose of getting its opinion as to the justness of the punishment fixed by the lawmaking power of the state. Its sole and only province and duty was to determine from the evidence before it whether the defendant had committed one of the crimes charged in the indictment against him,

and the discharge of this duty was all that the court urged upon the jury at the time in question. The principal authority relied upon by the appellant to support his contention in this matter is *People v. Kindelberger*, 100 Cal. 367 (34 Pac. 852), where it was held reversible error for the trial court to say to the jury, "That, in view of the testimony in this case, the court is utterly at a loss to know why twelve honest men can not agree in this case;" and follows such statement with language which was a severe reflection upon the members of the jury. One material difference between the court's remarks in that case and in this is in the fact that there the court, in effect, told the jury that the evidence would warrant a verdict, which the jury might have understood as indicating a verdict of guilty, while here there was no word said from which the jury could rightly gather that any verdict should be returned against the defendant. But, while we think the decision in the California case was, perhaps, necessary under the record, we do not concur in all of the reasoning upon which it is based. It certainly is not a sound rule of law to say that, because a trial court does not direct a verdict for the defendant on his own motion, the jury is to conclude that the court thinks the defendant guilty, still such is the substance of the reasoning in the case. In the other cases cited by appellant, the language used by the trial court was held to intimate that he believed the defendant guilty. We do not intend herein to commend all that was said by the trial court, but nevertheless we think no coercion or opinion was intended by the court or understood by the jury. As sustaining the views herein expressed, see *State v. Olds*, 106 Iowa, 110; *State v. Lawrence*, 38 Iowa, 51; *State v. Richardson*, 137 Iowa, 591.

VIII. The verdict was taken in the presence of the defendant, but while his counsel were absent from the courtroom; and this is assigned as error. No request seems to have been made for the presence of counsel, and there was

no error in taking the verdict in their absence. Code, section 5403, requires only the presence of the defendant when the verdict in a felony case is rendered, and the presence of counsel is not required. *State v. Shepard*, 10 Iowa, 126; *Martin v. State*, 79 Wis. 165 (48 N. W. 119); *Barnard v. State*, 88 Wis. 656 (60 N. W. 1058); *People v. Bennett*, 65 Cal. 267 (3 Pac. 868).

8. SAME: reception of verdict: absence of attorney.

If the defendant had asked and had been refused the right to poll the jury by his counsel, a different question would be presented, a question that we do not now determine. We find no error which would justify a reversal herein, and, as we are satisfied that the verdict and judgment are fully supported by the evidence, the judgment must be, and it is, *affirmed*.

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FRANCIS GIBSON, Appellant, v. CITY OF DENISON.

**Municipal corporations: DEFECTIVE SIDEWALKS: CONTRIBUTORY NEGLIGENCE.** A pedestrian using a defective sidewalk which he knew, or as an ordinarily cautious person ought to have known, was imprudent to pass over, and who might at the same time have taken another way equally convenient, was guilty of such negligence as will defeat recovery for an injury caused by the defective condition of the walk.

*Appeal from Crawford District Court.*—HON. F. M. POWERS, Judge.

FRIDAY, DECEMBER 15, 1911.

ACTION for damages resulting from a fall, caused by a defective sidewalk, in November, 1904. There was a trial in September, 1905, at which the jury, by direction of the court, returned a verdict for defendant. Judgment

was entered thereon, and in the month following an appeal to this court was perfected.—*Affirmed.*

*J. F. Glenn and P. W. Harding, for appellant.*

*T. V. Walker and Conner & Lally, for appellee.*

LADD, J.—It may be conceded that the walk, as alleged in the petition, was “an old, worn-out, rotten, decayed sidewalk, having been laid more than ten years” prior to the injury, and that for many years “the stringers supporting it had become rotten, worn out, and decayed to such an extent that the sidewalk boards nailed thereto would not hold,” and were “loose and dangerous to passengers passing over it,” and that in maintaining the sidewalk in this condition, the defendant was negligent. The sole inquiry is whether it conclusively appeared from the evidence that plaintiff by his own negligence contributed to his injury. Sweet street in the defendant city extends south of the Northwestern Railroad track, immediately beyond which there is a steep grade sloping to the south. On the west side of the street, down this incline, was the sidewalk in question, one hundred and sixty-five feet long. The highway was level, graveled, and cindered, and extended on to the south past plaintiff’s home.

The plaintiff testified that: “I knew that it always had been an unsafe walk, and on the date named I got on this sidewalk going to my home; just dropped in behind Harry Warmouth, a young man who was with me, and about a step ahead of me. He was walking on the outside, and I towards the center. He tipped up a board that did not seem to be fastened. My left foot went under it, and in struggling to get my foot loose I fell forward. Getting my foot out threw me on my side, and I struck with my full weight on the end of the plank.”

On cross-examination:

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Before this accident happened I could see as well as any common man, and there was nothing to hinder me from seeing the highway as it was, and as I did; nothing to hinder me from seeing the railroad tracks. And the only difference between taking the sidewalk and taking the highway from the railroad tracks to my home is that I could take the highway at the south side of the railroad track and at the north end of the sidewalk, and follow it all the way to my home; or I could take the sidewalk and follow it one hundred and sixty-five feet, and then cross a ditch at the south end of the walk, and go over to the highway, and I had to take the highway the rest of the way home. This I understood all the time; and when going from my home uptown I either had to go up the highway to the track, or else cross the ditch, and go over to the sidewalk and take it up to the track. And I knew that the highway was practically safe to travel, unless it was muddy or obstructed by teams, and that there was nothing that I remember of to prevent me going over on the road, if I had wanted to do so; and by going about fourteen feet from the north end of the sidewalk, on a perfectly level ground, I would have reached the highway; or I could have gone diagonally from eighteen to twenty-five feet from the end of the approach leading up to the railroad track southeasterly, on practically level ground, to the highway. There was nothing to hinder me from seeing that the ground running along this sidewalk and on the east side of it was level. . . . I knew the sidewalk was in bad condition when I went on it that day. I had known it before, and it was in bad condition. I knew it was in a dangerous condition, and that it was dangerous and unsafe for me to walk on it; and by 'unsafe' I mean a person might get hurt by walking on it, if he did walk in the center of it, and I knew and felt that the sidewalk itself was unsafe, for it jiggled up and down. This sidewalk jiggled up and down, and a sidewalk that jiggles up and down is because the stringers are weak. I did not consider that kind of a walk safe any place. I did not consider it in a safe condition, whether in the center or on the side of it; but it is safer in the center than in any other place. In addition to this, the boards were loose, and this I knew before, by the way they moved under my feet, that they were not solid. I

knew that before I went on there that day, but I went all the same. Yes; the boards *were loose, and knowing they were loose, and knowing that the stringers were unsafe and jiggled up and down, I went upon the walk as I say I did.*

He then explained that Warmouth was not in the center of the walk until he stepped off the board which flew up, and that the boards seemed all right, but there was nothing to nail them to. On redirect examination he testified that: "The reason I attempted to walk over the sidewalk, although I knew it was dangerous, is that I knew I could pass over it safely with care." On recross-examination he swore that: "All the time as I was approaching this walk the day I was injured, and as I went upon it, I knew it was dangerous; I knew it was not a safe walk; and I knew I had to be extremely careful to avoid something happening. Yes; that is so; and at the same time I knew the public highway run there, as I have described it, without any change."

The evidence was such as to exclude all doubt as to whether plaintiff appreciated the danger of passing over the sidewalk. In going to and from the business portion of the city, he necessarily took the well-graveled and cindered highway between his house and the short walk near the railroad track, and, as he knew the walk was dangerous, and that he "had to be extremely careful to avoid something happening" if he walked over it, he was negligent in attempting to do so, instead of continuing to the railroad track in the traveled portion of the highway. *Reynolds v. City of Centerville*, 151 Iowa, 19.

The proposition that a traveler who knows, or as an ordinarily cautious person ought to know, that it is imprudent to pass over a defective sidewalk, and does so, although he might have taken another path or course equally convenient and in the same direction, is guilty of such negligence as will defeat recovery for damages in event of injury, caused by the dangerous condition of the

walk, is well settled by the authorities. *McGuity v. City of Keokuk*, 66 Iowa, 725; *Parkhill v. Town of Brighton*, 61 Iowa, 103; *Hartman v. City of Muscatine*, 70 Iowa, 511; *Cosner v. City of Centerville*, 90 Iowa, 33; *Cook v. Town of Hedrick*, 135 Iowa, 23.

As pointed out in *Reynolds v. City of Centerville*, *supra*, to defeat recovery, it is not enough that the walk was unsafe for travel, and the plaintiff appreciated the danger, but it also must appear that he knew, or as an ordinarily prudent person ought to have known, that it was imprudent for him to walk over it. That with such knowledge plaintiff did so is fully established by his own testimony.

It follows that the court rightly directed the jury to return a verdict for defendant.—*Affirmed*.

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SUE A. HOYT, Plaintiff and Appellant, v. F. S. BROWN, Treasurer of Sac County, Iowa, Defendant and Appellee.

**Drainage: IRREGULAR PROCEEDINGS: REMEDY.** The statute providing  
1 an appeal for the review of error and irregularity in drainage proceedings is exclusive, and an independent action for that purpose will not lie, except upon a showing of utter want of jurisdiction.

**Same: ESTABLISHMENT OF DISTRICT: FINDING OF NECESSITY: SUFFI-**  
2 **CIENCY.** The finding of the board of supervisors that the establishment of a drainage district is a necessity satisfies the statute in this respect and is conclusive.

**Same: BOARD PROCEEDINGS: ADJOURNMENT OF BOARD.** Where the min-  
3 utes of a board of supervisors at the time of its regular session appear of record for successive days, the fact that at the close of each day's session the auditor appended to the minutes "Board Adjourned" did not destroy the continuance of that particular session; as the word adjourned may mean to take a recess from day to day, or for an indefinite period.

**Same: SERVICE OF NOTICE: WAIVER OF DEFECT.** A mere defect in the  
4 notice, or return of service thereof, in drainage proceedings is

cured by the voluntary appearance and filing of a claim for damages by the property owner.

**Same: TAX SALE: INJUNCTION: REDEMPTION.** Where it appears that  
5 a tax sale certificate was purchased and held by another with the knowledge and for the benefit of the landowner, he is not entitled to an injunction restraining the county treasurer from issuing a deed thereunder: And a purchase of the certificate by the owner operates as a redemption from the sale and eliminates further controversy as to the validity of the tax.

*Appeal from Sac District Court.*—HON. F. M. POWERS,  
Judge.

FRIDAY, DECEMBER 15, 1911.

**SURT** in equity. Plaintiff prays that certain proceedings of the board of supervisors in the establishment of a drainage district be held void, and that taxes assessed in pursuance thereof be held illegal, and that a purported tax sale of plaintiff's lands for the payment of such taxes be held void, and that the tax sale certificates be canceled, and that the defendant treasurer be enjoined from issuing deeds thereunder, and other relief. The trial court dismissed the petition. Plaintiff appeals.—*Affirmed.*

*Chas. D. Goldsmith and J. S. Lothrop*, for appellant.

*R. L. McCord*, County Attorney, and *W. A. Helsell*, for appellee.

**EVANS, J.**—The plaintiff is a resident of Carroll county, and is the owner of four hundred and eighty acres of land in Sac county. In 1906 and 1907, certain proceedings were had in such county in the establishment of drainage districts Nos. 5 and 11. Some portions of plaintiff's land were included within each of such districts. In each proceeding some benefits were assessed against portions of plaintiff's land. Plaintiff's lands were sold at tax sale for

the special taxes so assessed. No appeal was ever taken by plaintiff from the action of the board of supervisors in such drainage proceeding; nor was any objection ever made thereto pending the proceedings, except that a claim for damages was filed in one proceeding. The treasurer of Sac county is the sole defendant in this case. The remedy sought is a permanent injunction. The contention is that all the proceedings of the board of supervisors of Sac county were wholly without jurisdiction, and therefore wholly null and void. The record is voluminous. Appellant's contentions are concisely summarized by her counsel in argument, as follows:

#### Issues in the Case.

First. The board of supervisors was without jurisdiction to establish said drainage districts, in this:

(a) The proceedings for these ditches were commenced and prosecuted to completion under the provisions of chapter 68, Laws of the Thirtieth General Assembly, providing, from and including the petition, for the reclamation of a water-waste body, or district of land subject to overflow, or otherwise too wet for cultivation, and, as the lands within these ditch districts were not, in its entirety, nor in the several subdivisions thereof, of the character described in the law, the supervisors were without jurisdiction to proceed in the case under the petition submitted therefor.

(b) The territory included within these ditch districts, every acre of it occupied by cultivated farms long in successful operation, absolutely free from water trouble in the way of overflow, or otherwise preventing cultivation, a small portion thereof probably needing drainage only of water falling or coming thereon in times of continuous rains, provision for which is expressly designed and provided in chapter 2, title 10, of the Code, and, as the petition required by section 2 of that law was not presented to the supervisors, for such drainage, they were without jurisdiction to proceed with the construction of said ditches.

Second. That no survey of the territory of the alleged drainage districts, respectively, was ever made by an engineer appointed by the board of supervisors therefor, as required by section 2, chapter 68, 30th G. A.

Third. That no report of any engineer of a survey of said alleged drainage districts, respectively, with plats thereof, was ever made, as required by section 2 of the law last above cited.

Fourth. That no notice of a meeting of the board of supervisors for a hearing upon the petition and a return and recommendation of an engineer of an alleged survey of said drainage districts, respectively, was ever served upon appellant, as required by section 3 of the law last above cited.

Fifth. That at no time during the alleged proceedings for the establishment of said districts, respectively, did the said board of supervisors determine, approve, and adopt any plan for said ditches and districts, respectively, as required by section 3 of the law last above cited.

Sixth. That at no time in the proceedings for the establishment of said alleged districts, respectively, was there a determination and finding by said board of supervisors that the lands comprising the same were, as districts or bodies of land, subject to overflow, or too wet for cultivation, as required by sections 2, 3, and 5 of the law last above cited.

Seventh. That no permanent survey of said alleged drainage districts was ever ordered by said board of supervisors, or made, in said ditch proceedings, respectively, as required by section 6 of the law last above cited.

Eighth. That no assessment of benefits alleged to accrue to the lands comprising said drainage districts, respectively, was ever made by a commission for the classification and assessment of benefits upon such lands appointed thereto by said board of supervisors, as required by section 12 of the law last above cited.

Ninth. That no notice of a hearing before said board of supervisors upon a report of an alleged commission upon classification and assessment of benefits of, and upon the lands of said drainage districts, respectively, and in the proceedings for the establishment of each of said districts, was ever served upon appellant, as required by section 12 of the law last above cited.

Tenth. That on the dates, respectively, June 13, 1906, November 14, 1906, January 17, 1907, February 5, 1907, February 20, 1907, March 28, 1907, April 15, 1907,

April 16, 1907, and June 5, 1907, when records were made purporting to show meetings of and acts by said board of supervisors, relating to said drainage districts, respectively—acts important and necessary in proceedings for the establishment of drainage districts and the levy of assessments as a tax upon the lands thereof for the cost of the construction of ditches therein under the law therefor—said supervisors were not in session as a lawful board.

Eleventh. That the boundaries of said drainage districts, respectively, as reported and recommended by the engineer alleged to have surveyed the same, and the assessment of the alleged benefits thereto, as returned by the respective commissioners upon classification and benefits, included and was assessed upon a fractional part only of the lands of plaintiff in section 5, to wit, upon a part of each forty-acre subdivision thereof, while the tax levied by said supervisors upon said lands was upon each of said forty-acre tracts entire, and each tract so taxed was sold for the collection of the same.

Twelfth. That the establishment of said drainage districts and the construction of ditches therein, respectively, were purely private enterprises, conceived and consummated for the sole benefit of a few tracts of land through or along which said ditches were made to pass; the public having no interest therein, and deriving no benefit therefrom.

Thirteenth. That the lands of plaintiff in said drainage districts, respectively, can derive no benefit or advantage in any particular or degree whatever from the construction of said respective improvements, and no part of said lands was in a condition inimical to the health of the community, or the occasion of inconvenience to the public.

Fourteenth. That the said alleged drainage districts, respectively, as territories or bodies of land, were not in a condition productive of ill health in the community, not in any degree occasioning inconvenience to the public, and the construction of said improvements was not conducive to the public health, convenience, or welfare, or public benefit or utility.

Fifteenth. As to district No. 11, count 3, of the petition. The proceedings of said supervisors in levying an additional assessment upon the lands of plaintiff within said district for the cost of the construction of the said ditch

therein, and the proposed sale of said lands for the collection of such additional tax, for which a restraining order is prayed, all matters set out as issues herein in paragraphs first to thirteenth, both inclusive, apply hereto, and further as to said count 3 of the petition.

Sixteenth. That the said plaintiff had no notice of the levy of an additional tax upon her said lands for the cost of the construction of the ditch in said district No. 11, nor of any such assessments, nor of the purpose of the supervisors to levy thereon such additional tax, and no opportunity was afforded her for objections thereto.

I. The initial defect upon which much reliance is placed is that the proceedings complained of were had under chapter 68 of the Laws of the Thirtieth General Assembly,

1. DRAINAGE: irregular proceedings: remedy.

otherwise known as sections 1989-a1—1989-a47 of the Code Supplement. It is urged

that the territory included within this district

was not wholly waste and wet land, but that it comprised cultivated farms, of which only limited portions required drainage. It is urged, therefore, that the drainage proceedings in relation thereto should have been prosecuted under chapter 2, title 10, of the Code, otherwise known as sections 1940-1947. To sustain this contention would be to overturn practically all the drainage proceedings which have been had in this state for several years. Practically all the proceedings which have come before us for review since the enactment of chapter 68 of the Thirtieth General Assembly have been prosecuted under such chapter. The applicability of such statute to the particular case has never before been questioned. Necessarily, it devolves upon the petitioners in any proceeding to set forth the facts essential to the maintenance thereof. Such facts, being found by the board of supervisors, fix its jurisdiction to proceed in the manner pointed out by the statute. Such was the course followed in these proceedings. It was sufficient to answer the call of the statute. The statute provides a method of direct review by appeal of all such

proceedings. Until such review is had, the finding of the board must be deemed conclusive.

The plaintiff has chosen to assail the proceedings, not by appeal, but by this independent action. In such an action she can not have the benefit of a mere review of the regularity of the proceedings. She can only prevail by showing want of jurisdiction. The statute especially provides that the remedy by appeal shall be exclusive, and we have held repeatedly that in no other way can relief be had against mere error and irregularity in the proceedings. *Wood v. Hall*, 138 Iowa, 308; *In re Lightner*, 145 Iowa, 103; *Clifton Land Co. v. City of Des Moines*, 144 Iowa, 625; *Andre v. Burlington*, 141 Iowa, 65. Following these cases it is clear that we can not now, in this independent action, permit the findings and conclusions of the board to be contradicted by evidence *aliunde*; nor can its jurisdiction be assailed in that manner.

It is urged in this connection that as to district No. 11 the board of supervisors failed to make any finding that the district was "subject to overflow and too wet for cultivation," and failed to make any other finding than that the drainage "is a necessity." The record in this respect, however irregular, is quite as good as that found in the case of *Oliver v. Monona County*, 117 Iowa, 45. This question was disposed of in that case as follows: "It is not required by the statute that such finding shall be made of record. The statute says that if the board finds the ditch to be necessary, and that it will be conducive to public health, etc., then it shall proceed to locate and establish such ditch. The establishment of the ditch, therefore, involved the finding as to the propriety of it, and is conclusive on that point."

2. SAME: establishment of district: finding of necessity; sufficiency.

It is also urged that many of the purported proceedings of the board were had by the members of the board while they were not regularly in session as a public body.

This objection rests largely upon the form of the minutes as kept by the county auditor. For instance, at the time of the regular sessions of the board, the minutes and their proceedings appeared of record for successive days. But at the close of each day's minutes appeared the words, "Board adjourned." The testimony of the auditor in explanation of the minutes in this form was that when the board was in session from day to day successively he indicated the close of each day's proceedings by, "Board adjourned." If the board adjourned to some future date, other than the next day, such fact was indicated by stating the specific date to which the board adjourned. If the adjournment was *sine die*, such fact was also indicated. In short, he used the word "adjourned" in the temporary sense of "taking a recess." It is urged by appellant that the record is conclusive, and that it can not thus be explained away by oral evidence. She contends, also, that of legal necessity the words "Board adjourned" must mean a final adjournment *sine die*, whereby the session of the board was fully terminated. We think the appellant is leaning too heavily upon a mere word, and that the definition of the word is too flexible to bear the pressure of the argument. Turning to Webster's New International Dictionary, we find the following definitions, among others, of the word "adjourn": "To close or suspend for the day;" "suspend, take a recess;" "to suspend business for a time, as from one day to another, or for a longer period, or indefinitely." It is manifest that the sense in which the auditor used the word in his minutes is justified by the foregoing definitions. It is therefore immaterial whether we regard his testimony as admissible or not. We are satisfied that this form of the minutes was by no means fatal to the further continuance of the particular session of the board.

It is also contended that the plaintiff had no notice of the proceedings as to district No. 11. It is not very

clear from the record just what was done in the matter of notice to the plaintiff in such proceedings. It appears that the name of the plaintiff was not included in the published notice. We quote from the appellant's argument at this point: "Attempt was made to cure that defect by personal service upon her at her home in Carroll county, but the service of the notice was *there* made upon her husband, M. A. Hoyt." It is argued, however, that the sheriff's return on the notice failed to show that it was served upon a member of her family, or at her usual place of residence. As we understand the record, the service was in fact good, but the return of the sheriff was defective. The sheriff's return did show that he served a notice upon the plaintiff's husband, M. A. Hoyt. Some presumption might fairly be indulged that plaintiff's husband was a member of her family, and that her "home" was her usual place of residence. Be that as it may, the defect was one which could have been cured by mere amendment to the sheriff's return. It was not a case of *no notice*, nor even of defective notice, but of a defective return of the sheriff. It further appears that plaintiff's husband was the "manager" of her property, and he acted for her promptly, and filed a claim for her for \$2,500 damages. The plaintiff knew of such claim at the time. If, therefore, there was any irregularity in the notice or in the service thereof, it was quite cured by the voluntary appearance of the plaintiff. *Ross v. Supervisors*, 128 Iowa, 427; *Chrisman v. Brandes*, 137 Iowa, 433; *Head v. Board of Sup'rs of Greene & Calhoun Counties*, 141 Iowa, 651; *In re Lightner*, 145 Iowa, 95.

For the reasons appearing in the next division of this opinion, we will not pursue in further detail all the points made in appellant's argument. The foregoing are, perhaps, the most salient. It is sufficient to say now that we have considered them all. We are not prepared to say that the proceedings of the board were free from irregularity and

error; but we are very clear that no such irregularity appears as would destroy the jurisdiction of the board, or render its proceedings void. This conclusion is decisive against granting relief by injunction.

II. There are other facts in the record which are quite conclusive against the appellant as to the major part, at least, of her case. Some part of her land was sold at tax sale for the payment of the tax now in controversy. It is claimed by appellee that she redeemed from such tax sale; and therefore there is nothing to enjoin. The form of the redemption was in the purchase of the outstanding tax certificates of sale. This purchase was done by her attorney, at the request of her husband. The only dispute possible at this point is whether the tax certificates are held for the benefit of the plaintiff, or whether her husband holds them in hostility to her title. The appellee called the husband, M. A. Hoyt, as a witness on this question, and he testified as follows:

I know who owns the certificates of tax sale which are involved in the petition in this case. I had them bought. I do not think that they were assigned to me; they were assigned in blank. I had Mr. Goldsmith buy them after this action was brought, and I had them signed in blank. I own them. I can not say positively whether I owned them when this suit was brought or not. I told Mr. Goldsmith, who was one of the attorneys for me, to buy them, and he procured them and had them assigned in blank, and he has got them yet. Q. He has got them as the attorney for the plaintiff? A. For the plaintiff in this case. Q. Yes? A. No, sir. Q. You managed this case, didn't you? You were the man who saw Mr. Goldsmith about this case? A. I might be considered one of the attorneys in the case. Q. I did not ask you that. I asked you if you did not act for your wife in seeing Mr. Goldsmith about this case? A. I did; yes. Q. Previous to beginning it? A. Yes. Q. You were the man who employed Mr. Goldsmith? A. Yes; I employed Mr. Goldsmith and also Mr. Lothrop. I em-

ployed them to try this case, and in addition to employing them to try this case I instructed and had Mr. Goldsmith to buy up the certificates of tax sale for the purchase of the land now involved in controversy in this case, and I had them assigned in blank, but I did it for myself. Q. I did not ask you for whom you did it. You did it in view of this litigation, didn't you, and to keep the land from going to tax deed? A. I did it for the purpose of getting control of it and controlling it. My purpose in getting them was to have absolute control of these tax certificates, and to avoid the penalty and interest, etc. I can not say that I had any ambition to get a tax deed on my wife's land. I do not know but what I may some time. Q. Well, that was not the purpose for which you bought up the tax certificates involved in the trial of this suit, was it? A. The reason that I bought them was because I had the money, and I could spare it, and I thought I had better put it into them certificates. Q. Yes. You thought you better put it in the certificates and control the certificates pending this litigation? A. The money was mine. Q. Mr. Hoyt, you have managed the business connected with this land and connected with this case always, have you not? A. Why, I have charge of that for Mrs. Hoyt; yes. Q. Well, whatever you do has her sanction? A. Yes; she usually agrees with me in whatever I do.

The plaintiff herself was examined by appellee, and testified to the agency of her husband as follows:

I have not been on this land in controversy very often. I do not manage it myself. My husband, M. A. Hoyt, manages it. He has my consent to do so, and, as a matter of fact, he is my agent. Q. Whatever he does in regard to this land, or in regard to any of this land, is with your sanction, and has been done because he had authority from you to so act? A. Well, we might not always agree. Q. I suppose this is true; but, when you do not agree, what he does goes, don't it? A. Yes. Q. As a matter of fact, Mr. Hoyt manages this land entirely, does he not? A. Yes. I knew that there was a proposed drainage district to be established. I knew of drainage district No. 11. My husband talked it over with me. He said they were proposing to form a ditch, but I did not know whether

they really did or not. I understood that they were proposing to form a ditch. I had knowledge of that fact. I did not think it was just to tax us, unless we should receive some benefit; and neither my husband nor I thought we received any benefit. My husband was on the ground, and the matter of looking after it was left in his hands. I do not know whether I personally knew that they proposed to establish drainage district No. 5. I do not remember that my husband said anything about this to me. As a matter of fact, I did not pay any attention to either of these districts. The matter was turned over in the management of these lands entirely to my husband, M. A. Hoyt. He has power to sign papers, and rent my land and sign leases, and do whatever is necessary in regard to these lands. I do have a dim recollection that there might have been a notice served on me in regard to district No. 11. As a matter of fact, neither the ditch in district No. 5 nor the ditch in district No. 11 touches my land. The truth is that Mr. Hoyt, either because he assumed to, or because I gave him authority, had complete control over these farms. That is true for all these years. Q. You told him to do whatever was necessary in regard to whatever arose which in any manner interested you as affecting those farms, did you not? A. Yes.

From the foregoing it is apparent that the husband, M. A. Hoyt, has a large authority as agent for the plaintiff in relation to the land in question. As he puts it, he "might be considered one of the attorneys in the case." He directed the purchase of the tax sale certificates. This was done by one of plaintiff's attorneys of record in the case. Such certificates are now in his hands, indorsed in blank. Who can ever demand from the appellee, county treasurer, tax deeds under these certificates? Without appellant's connivance, her husband could not, if he would, acquire to himself a tax title under these certificates purchased in the manner and under the circumstances shown. The plaintiff, therefore, has no need of the injunctive relief which she prays. Furthermore, her purchase of the certificate was a redemption from the sale, and foreclosed

all further controversy as to the validity of the tax. See *Morris v. Sioux County*, 42 Iowa, 416; *Sears v. Marshall County*, 59 Iowa, 603; *Thayer v. Coldren*, 57 Iowa, 112; *Weaver v. Stacey*, 93 Iowa, 689; *Manning v. Poling*, 114 Iowa, 20.

We do not overlook the fact that count 3 of the petition sets forth an assessment amounting to about \$97, which was made against plaintiff's land because of the insufficiency of the former assessment. As to such assessment, what is here said in this division of the opinion is not decisive. As to such later assessment, special grounds of attack are laid, to the effect that the plaintiff had no notice thereof, and that there was fraud in the proceedings at this point. At the trial, however, no proof was offered in support of this contention. The alleged invalidity, therefore, of this later assessment rests upon the same grounds as have been considered in the first division of this opinion. We are satisfied that the appellant is not entitled to the relief prayed, and the order of dismissal entered in the trial court is accordingly *affirmed*.

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DES MOINES NATIONAL BANK, and ARTHUR REYNOLDS in his own behalf and in behalf of all other stockholders of said Des Moines National Bank, who appeal in their own behalf and in behalf of all the stockholders of said bank, v. THE CITY OF DES MOINES, and others, Appellants.

**Taxation:** NATIONAL BANK SHARES: VALUE: DEDUCTION OF GOVERNMENT BONDS. That portion of the capital of a national bank invested in government bonds should be deducted from the bank assets in determining the value of its shares of stock for the purpose of taxation.

*Appeal from Polk District Court.*—HON. JAMES A. HOWE, Judge.

FRIDAY, DECEMBER 15, 1911.

THE facts appear in the opinion.—*Affirmed.*

*Robert O. Brennan, Fred W. Williams, and J. M. Parsons, for appellants.*

*Hager & Powell, for appellees.*

SHERWIN, C. J.—The Des Moines National Bank and Arthur Reynolds, in his own behalf and in behalf of all the other stockholders in the said bank, appealed from the action of the city council of the city of Des Moines acting as a board of review. The issue was whether the bank and its stockholders in arriving at the value of its shares of stock for taxation were entitled to deduct from its assets its bonds of the United States. The bank was shown to be a National Bank, organized and doing business under the laws of the United States with a capital of \$300,000, divided into 3,000 shares of \$100 each. It owned in good faith, and not for the purpose of avoiding taxation \$180,000 in par value of the bonds of the United States. This fact was made known to the assessor, and the claim was made that the bank and its stockholders had the right to deduct the amount of said bonds from its capital and surplus in determining the value of its shares for taxation to its shareholders. The claim was denied by the assessor, and thereafter the bank and the shareholders made the same claim before the board of review. The board also disallowed the claim, and an appeal was then taken to the district court, where, upon a trial, the court reduced the valuation of the shares of stock as found by the board of review from \$100 per share to \$38.75 per share by reason of the bank's ownership of the \$180,000 of government bonds. The city alone appeals from the decision of the district court. It was conclusively shown,

and the trial court so found, that at the time of the making of the assessment complained of there were four national banks organized under the national banking law in the city of Des Moines, with an aggregate capitalization of \$800,000 and a total surplus of \$360,000, and that at the same time there were in the city ten savings banks, organized under the state laws with an aggregate capitalization of \$1,100,000 and a total surplus of \$386,971.58, and four state banks with a capitalization of \$250,000 and a surplus of \$76,818.39. It was further shown that all but two of the savings banks and all of the state banks were at the time engaged in commercial banking business in competition with the plaintiff bank. It was not claimed in the proceedings before the board of review and the district court that the assessment was wholly void, but the claim was that in fixing the value of the plaintiffs' shares of stock the value of the bonds held by the bank should be deducted from its assets, and that a failure to make such reduction was a discrimination against the bank and its stockholders, and in violation of section 5219 of the Revised Statutes of the United States (U. S. Comp. St. 1901, p. 3502). The prayer of the petition was that the assessment against the several stockholders be modified and corrected by deducting from the value of the capital stock of the bank the amount of its government bonds.

Section 5219 of the Revised Statutes provides that shares of stock in national banks shall not be taxed at a "greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such state." This statute, in effect, provides that shares of stock in national banks may be taxed by the state, provided no discrimination is made against such shares in favor of shares of stock of other banks in competition with national banks. *Mercantile National Bank v. New York*, 121 U. S. 138 (7 Sup. Ct. 826, 30 L. Ed. 895). In *Home Savings Bank v. Des Moines*, 205 U. S. 503 (27 Sup. Ct. 571, 51 L.

Ed. 901), it was, in effect, held that, under the taxing law of this state as it then stood, no tax was placed upon the shares of stock of state and savings banks, but taxed the capital of such banks, and that government bonds held by such banks must be deducted from their assets in making their assessments. The effect of that decision was to relieve the stock of state and savings banks from taxation, and to require the taxing power of the state to deduct from the assets of such banks the amount of government bonds held by them. So that, from whatever point the subject be viewed, the government bonds held by state and savings banks must be deducted from the value of the property to be assessed. The power to tax shares of stock in national banks is conferred by section 5219, Rev. St. U. S., and it can only be done provided that such taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such state. Other moneyed capital has been defined as capital in corporations carrying on the business of banking as defined by law and custom, and which is employed in competition with the business of national banks. *Mercantile National Bank v. New York*, *supra*; *First National Bank v. Chapman*, 173 U. S. 205 (19 Sup. Ct. 407, 43 L. Ed. 669); *Jenkins v. Neff*, 186 U. S. 230 (22 Sup. Ct. 905, 46 L. Ed. 1140); *First National Bank v. City Council of Estherville*, 150 Iowa, 95.

And the taxation of state and savings banks, which are in competition with national banks, upon their assets, while national banks are taxed on their shares of stock, has been held to create a discrimination against national banks. *New York v. Tax Commissioners*, 94 U. S. 415 (24 L. Ed. 164); *Bradley v. Illinois*, 4 Wall. 459 (18 L. Ed. 433). In *Van Allen v. Assessors*, 3 Wall. 573 (18 L. Ed. 229), it was held, in effect, that where a state taxes its own banks on its capital, and thus permits a deduction of government bonds, a tax on national bank

shares will not be upheld for the reason "that this tax of the capital is not an equivalent for a tax on the shares of the stockholders." It is manifest that under the rule of the authorities cited the taxation of national bank shares of stock, without deducting therefrom the government bonds held by the bank issuing such stock, would create a discrimination against national banks in violation of section 5219 of the Revised Statutes. Moreover, we held in *First National Bank v. City Council of Estherville*, 150 Iowa, 95, that shares of stock of national banks were not taxable under the then existing statutes as construed in the *Home Savings Bank* case, because to so tax said shares would be a discrimination against capital invested in national bank stocks, and hence violative of section 5219 of the Revised Statutes, as construed by the Supreme Court of the United States. In the instant case the assessment was made under the law in force at the time involved in the *Estherville* case; and, if shares of national bank stock were not taxable at all at that time, because of an unjust discrimination between savings and state banks and national banks competing in business, it is manifest that the plaintiffs were entitled to have deducted from the value of their stock the government bonds owned by the bank at the time. A part of the bank's capital was then invested in and represented by these bonds, and in an assessment of the bank's property the bonds would have been deducted from the value thereof because they could not be taxed. *Home Savings Bank v. Des Moines*, *supra*. National bank shares can not be taxed differently from state banks or from shares of stock therein as to the amount of the tax. *Van Slyke v. Wisconsin*, 154 U. S. 581 (14 Sup. Ct. 1168, 20 L. Ed. 240); *Bank v. Commonwealth*, 9 Wall. 353 (19 L. Ed. 701).

The power of this state to tax national banks or the shares of stock in such banks is derived from Congress, and the decisions of the United States Supreme Court on

questions touching the power of the state in this respect are controlling. We reach the conclusion, therefore, that the district court did not err in deducting from the value of plaintiffs' shares of stock the bonds held in good faith by the bank, and that the judgment should be *affirmed*.

WEAVER, J.—For reasons stated by me in a dissenting opinion filed in the case of *Bank v. Estherville*, 150 Iowa, 95, I am unable to agree with the conclusion of the majority.

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W. W. MORROW, Treasurer of State, Appellant, v. HENRY DEPPER, MARIA ANNA WEBER and MARIA ANNA LICKTEIG.

**Taxation:** COLLATERAL INHERITANCE TAX: APPLICATION OF LAW. The collateral inheritance tax law contains no retroactive provision, and is therefore not applicable to an interest in property which had vested prior to the time it took effect, even though the interest acquired was subject to contingencies which might affect the future enjoyment thereof.

*Appeal from Kossuth District Court.*—HON. D. F. COYLE, Judge.

FRIDAY, DECEMBER 15, 1911.

ACTION to recover an inheritance tax. The case was submitted on an agreed statement of facts and plaintiff's claim was disallowed. Plaintiff appeals.—*Affirmed*.

H. W. Byers, Attorney-General, John Fletcher, Assistant Attorney-General, and L. J. Dickinson, County Attorney, for appellant.

Sullivan & McMahon, for appellees.

McCLAIN, J.—Prior to the year 1896 these defendants and other persons, among whom were Maria Anna Schneider and Maria Anna Becker, belonged to a semi-religious community, the principal object of which was to erect a church and other buildings for religious purposes in Waldfischbach, Bayerische Rheinpfalz, Germany, to which object they had for a number of years been donating large sums of money, and to which object they intended to donate all their accumulations, except that part necessary for their support during their lifetime. On June 30, 1896, the defendants joined with Mrs. Schneider and Mrs. Becker, above named, in executing a trust deed (recorded the following day), in which it was recited that, in consideration of the mutual benefits to be derived by them from the instrument, they, as absolute owners in fee of the property on which an inheritance tax is now sought to be collected, mutually, jointly, and severally conveyed said real estate to themselves as trustees for the purposes thereafter set forth, subject to the conditions and provisions that at the death of each the remaining living parties should continue as surviving trustees, holding title to said real estate for the purposes provided, said property to be owned, enjoyed, and possessed by them as trustees during their natural lives for their support and maintenance, with the further provision that said real estate might be sold by said trustees and a conveyance given by them, the proceeds to belong to them as trustees and become a part of the fund for the purposes therein specified, and that upon the decease of the last one of them all the property, including its proceeds, should vest in the priest in charge at that date of St. Benedict's Church of Prairie Township, Kossuth County, Iowa, as succeeding trustee for the same purposes. It was then provided in the instrument that a certain storehouse and the acre of ground upon which it was situated should be given and turned over to St. Benedict's Church, already described, and that all the residue

should, within one year of the death of the last surviving party to the instrument, be turned over to the trustees of the Church of Maria Rosenberg in Waldfischbach, Baye-rische Rheinpfalz, Germany; the priest trustee being given authority to convert the real estate remaining unsold into cash and turn the proceeds over to said Church of Maria Rosenberg, and that thereupon, and not until then, the trust should cease and lapse. Provision was also made for the failure of the priest named to accept the trust, to the effect that in such event the district court of Kosuth county should appoint a trustee to carry out the terms, provisions, and conditions of the trust remaining unfulfilled. It is agreed that after the 30th of June, 1906, the only interest of the parties to this deed of trust in the property described was the interest created by such deed of trust. It is also agreed that in September, 1895, the will of Maria Anna Schneider was executed, bequeathing all her property, real and personal, to the other persons named, and that about the same time Maria Anna Becker executed a similar will, and that these two wills were duly probated on the death of said testatrixes, respectively, in 1900 and 1901.

The contention for the plaintiff is that the defendants entered into the substantial enjoyment of the shares of Mrs. Schneider and Mrs. Becker after the dates on which the wills were respectively probated, and became entitled to the income and profits of the property under contingencies which might possibly consume the *corpus* and that a tax should be imposed on the value of such interests acquired by the defendants, estimated as of the dates of the probating of said wills, respectively, and that, as defendants were not relatives, the interests which they acquired are subject to a collateral inheritance tax. The trial court held that nothing passed to anybody under the wills of Mrs. Schneider and Mrs. Becker, and that under the trust deed, which was executed before the collateral inheritance

tax law took effect, the persons named therein as trustees entered into possession and enjoyment of the premises at once upon the execution of such deed, with the result that the defendants were not liable to pay any collateral inheritance tax on the property or any part thereof.

Under the express stipulation in the statement of facts that after the execution of the trust deed the interests which the parties thereto, or either of them, had in the property in question, or any part thereof, were the interests created by such deed, no other conclusion than that announced by the trial court could properly be reached. The collateral inheritance tax law contains no provision making it retroactive, or applicable to any interests in property which became vested prior to its taking effect, even though such interests might be subject to conditions or contingencies which would affect the future enjoyment of such interests. This is settled by the opinion of this court in *Lacey v. State Treasurer*, 152 Iowa, 477, announced since the present appeal was presented to this court (a different opinion in the same case having been set aside upon rehearing). No further discussion of the points presented seems to be called for.

The decree of the trial court is *affirmed*.

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CHARLES S. BLACKETT, Appellant, v. S. B. ZIEGLER, et al.,  
Appellees.

**Wills:** REVIVAL: REPUBLICATION. A will which has been expressly  
1 revoked may be revived by re-execution or by a codicil legally  
executed; but when done by codicil an intention to revive the  
former will must be shown, and this may be by any reference  
therein which makes such intent obviqus. The codicil need not  
be attached to the will to make it operative, but there must be  
such reference to the will as to furnish the means of identifica-  
tion without other evidence, except to show that the document  
sought to be incorporated is identical with that referred to in

the will. In this case an instrument executed at or about the time of the destruction of a second will which contained an express revocation of the former one, addressed to the judge of the district court, and requesting him to appoint a certain person as administrator without bond, was not sufficient to revive the former will, as there was no showing of an intent to do so.

**Same: PRESUMPTION AS TO REVIVAL.** The mere destruction of a second  
2 will expressly revoking a former one raises no presumption that the former will is revived; that question depends upon the testator's intention, which must be gathered from all the circumstances in the case.

**Same: CANCELLATION OF WILLS: STATUTE.** The cancellation of a will  
3 as provided by the statute may be by an instrument of cancellation, by the execution of another will containing an express clause of revocation, or by the execution of an inconsistent will without such clause; the term cancellation meaning a revocation by a written instrument.

**Same.** The execution of an instrument of cancellation effects a  
4 revocation of the will whether the instrument is probated or not.

**Same.** An implied revocation of a will from the execution of a  
5 second inconsistent will does not become effective if the second will is destroyed or revoked before probate.

**Same: REVIVOR: EVIDENCE.** In this case the testator executed a sec-  
6 ond will in which she expressly revoked a former one, but subsequently destroyed the second, preserving the first until her death. *Held*, that the first will was revoked by the execution of the second, but the question of revivor of the first one by the destruction of the second was one of intent to be gathered from the admissible parol evidence. And on this question the declarations of the testator at the time of the revocation are admissible.

*Appeal from Fayette District Court.*—HON. L. E. FELLOWS,  
Judge.

MONDAY, DECEMBER 18, 1911.

ACTION to set aside the probate of a will. There was a judgment for the defendants. Plaintiff appeals.—*Affirmed.*

V. T. Price and C. S. Blackett, for appellant.

*Ainsworth & Hughes* and *Clements & Estey*, for appellees.

DEEMER, J.—Elizabeth W. Lewis, now deceased, made a will in the year 1895. Thereafter, and in 1904, she made another, which disposed of her estate, and contained a clause revoking the will of 1895. She retained both wills until the year 1905, when she destroyed the one of 1904 by burning it, and about the same time executed the following paper: "To the Judge of the District Court of Fayette County, Iowa: I hereby request you in case of my death to appoint S. B. Ziegler, of West Union, Iowa, as administrator of my estate without giving bonds." This she signed, and her signature was witnessed by two witnesses. The will of 1904 was left in the possession of a Mr. Preston, who drew it, until December of that year, when testatrix requested Mr. S. B. Ziegler, who had drawn the first will and had it in his possession, to get the second one from Preston, which he did, and Ziegler took both wills to Mrs. Lewis' home, where each one was read to her, clause by clause, in the presence of Mr. and Mrs. Caldwell, the persons who witnessed the paper which we have heretofore set out, and after some discussion Mrs. Lewis said that she wanted the first will to stand, and she directed Ziegler to destroy the second one, which he did in her presence, and in the presence of the Caldwells. After the destruction of the second will, Mrs. Lewis said to Mr. Ziegler: "There is no executor in this will that stands. . . . I want you to act as my executor; you have always done my business for a great many years, and I want you to act." Mr. Ziegler made the objection that he did not care to act as executor of the will, because of the necessity of giving a bond, whereupon Mrs. Lewis said that he did not need to give a bond. The writing was then prepared by Mr. Ziegler, and was executed and witnessed as shown. This so-called codicil does

not seem to have been attached to the will, but it was kept by Mr. Ziegler, and was presented for probate with the will. The first will was admitted to probate, and this action is brought to set aside the order. The trial court denied the relief asked, and plaintiff appeals.

The questions presented are new to this court and some of them are the subject of many conflicting and irreconcilable decisions. In the absence of statute governing some of the matters arising upon the appeal, it may be said there is no general rule, and that each court for itself has found it necessary to fix the rule for its jurisdiction. The relevant statutes of this state are as follows:

All other wills, to be valid, must be in writing, signed by the testator, or by some person in his presence and by his express direction writing his name thereto, and witnessed by two competent persons; but if a codicil is duly executed to a will defectively executed and clearly identified in such codicil, the will and codicil shall be considered one instrument and the execution of both sufficient. Code, section 3274.

Wills can only be revoked in whole or in part by being canceled or destroyed by the act or direction of the testator; with the intention of so revoking them, or by the execution of subsequent wills. When done by cancellation, the revocation must be witnessed in the same manner as the making of a new will. Code, section 3276.

Section 3274 is quoted because of its bearing upon the claim that the paper heretofore set out is a codicil to the first will, and, having been executed after the destruction of the will of 1904, it amounted to a republication of the first will. As to that, more hereafter.

It is admitted that the first will was never destroyed by the maker, and it is also conceded that the second will contained an express revocatory clause of the first will, and that this second will was absolutely destroyed by burning. These being the undisputed facts, the questions involved are: (1) Was the first will republished by the paper hith-

erto quoted, which, it is claimed, is a codicil to that will?  
 (2) Did the destruction of the second will under the circumstances disclosed amount to a revivor of the first will?

Every one concedes that a will expressly revoked by a subsequent will or other instrument of revocation may be republished or revived by the re-execution thereof, or

by a codicil executed in accordance with  
 1. WILLS: re-  
 vival: repub-  
 lication. statutory requirements for the execution of  
 wills, showing an intention to revive the

same. When done by a codicil, an intent to republish or revive the former will must be shown, and this may be inferred from any reference which makes such intent obvious, as, by reference to "my will," or to the will by date. *Crosbie v. McDonal*, 4 Ves. 610; *Payne v. Payne*, 18 Cal. 291. And the codicil need not be attached to the will. *Van Cortlandt v. Kip*, 1 Hill (N. Y.) 590; *Pope v. Pope*, 95 Ga. 87 (22 S. E. 245); *Appeal of Wikoff*, 15 Pa. 281 (53 Am. Dec. 597). But, if not attached, there must be such reference to the will intended to be republished as to identify it, or to furnish the means for identification, without resort to any other testimony, save to show that the document sought to be incorporated is identical with that referred to in the will. The codicil itself must refer to the paper sought to be incorporated, if it be then in existence. *Newton v. Seamen's Society*, 130 Mass. 91 (39 Am. Rep. 433); *Damon v. Bibber*, 135 Mass. 458; *Parrott v. Avery*, 159 Mass. 594 (35 N. E. 94, 22 L. R. A. 153, 38 Am. St. Rep. 465); *In re Sohor*, 78 Cal. 477 (21 Pac. 8); *Crosby v. Mason*, 32 Conn. 482; *Booth v. Church*, 126 N. Y. 215 (28 N. E. 238); *Allen v. Maddock*, 11 Moo. P. C. 427 (4 Gray's Cases, 198); *Goods of Sunderland*, 4 Gray's Cases on Property, 217; *In re Young's Estate*, 123 Cal. 337 (55 Pac. 1011); *In re Andrews' Will*, 162 N. Y. 1 (56 N. E. 529, 48 L. R. A. 662, 76 Am. St. Rep. 294).

This is doubtless the rule intended to be announced

by Code, section 3274, hitherto quoted. In other words, all wills must, as a general rule, be in writing, duly signed and attested; and if a codicil is relied upon for a publication it must clearly identify the will, and parol testimony is not admissible, in the absence of any attempt to identify the will in the codicil. These being the rules announced by all of the authorities, it is apparent that the written instrument executed by Mrs. Lewis, either contemporaneously with or after the destruction of the second will, cannot be treated as a codicil to the first one, because it was not attached to nor did it refer in any manner to the prior will.

Moreover, the paper itself does not indicate any intent on the part of the maker to revive a former will. Construed without reference to the other testimony, it indicates a thought on the part of the maker that Ziegler should act as administrator of her estate without bond. If it means anything, this would seem to indicate that the maker wished her estate to be administered upon according to law, and not under any will. Manifestly this so-called codicil can not be considered a republication of the first will.

The second question presented is much more difficult of solution. Shortly stated, it is this: Does the destruction or cancellation of a second will, containing an express

2. **SAME: presumption as to revival.**      revocation of a former one, in itself revive the first or former one? Upon no subject relating to the law of wills are the authorities in such hopeless and irreconcilable conflict. A learned text-writer has thus stated the law of England as it existed prior to the adoption of the statute known as 1 Vict. ch. 26, section 22:

The English law prior to statutes upon this difficult question was in great confusion. The ecclesiastical courts seemed disposed to hold, in cases of testaments, that no presumption arose, either for or against the validity of the first will, upon such a state of facts, and that the ques-

tion was to be settled by the intention of the testator as disclosed by the evidence. The common-law tribunals in dealing with wills were inclined to adopt the theory that the revocation of the second will raised a presumption that testator thereby intended the first will to be in full force and effect. This was a *prima facie* presumption only, and might be rebutted by evidence of a contrary intention. The two sets of tribunals thus seemed to agree that the testator might revive his first will by the revocation of his second, if he intended to do so. Further doubt, however, arises upon attempting an analysis of the earlier English cases for two different reasons: First, it is not always clear whether the English courts are discussing a case where the second will expressly revoked the first, or where it was merely inconsistent with it. Second, in many of the cases, especially in the ecclesiastical courts, the declarations of the testator might have been sufficient to republish his first will, as no set form was required for the execution of wills of personal property. It is therefore at times hard to determine whether the first will is valid, because it has been republished after the revocation of the second will, or whether the mere revocation of the second will, with intent to revive the first, revived it without republication.

This condition of uncertainty upon an important and often occurring question was ended in England by the statute 1 Vict. chapter 26, section 22, which provides in substance that a will once revoked can be revived, but by a new codicil, or re-execution. This statute has always been held to apply with equal force to a will revoked either by a later will containing a clause of revocation, or by a later inconsistent will. Where such a statute is in force, the revocation of a later will by a testator who intends thereby to revive his earlier will, and who so declares his intention, has no effect to revive his earlier will, unless there is a reexecution or republication, as contemplated by the statute. Page on Wills, sections 271, 272.

The same writer, in speaking of the law in this country, said:

In the United States, in the absence of a statute on this subject, the decisions are by no means uniform. The

better line of authority made a distinction between the cases where the later will contained an express revocation clause, and where it was merely inconsistent with the earlier will. 'There seems to have been material distinction, and on good ground, between the state of a former will after a second one merely inconsistent with it, and its state after a second one with a declaration expressly revoking it. In the first case, the only chance for the second to operate in revocation of the first, according to the prevalent theories of the courts, was by its coming to a head as an active will, which it could do only by surviving its author. Being the last expression of the decedent, and at the same time practically inconsistent with the prior one, the intent to repeal the first by it was to be implied. In case, however, of its being recalled by the testator in his lifetime, it could not, on the theory referred to, be taken to have the effect to do away with its predecessor. Being cut off before having its disposition of property awakened into life, it could have no affirmative operation through its dispositions upon the estate.' Where such distinction is recognized, the destruction of a later will inconsistent with an earlier will, but containing no clause of express revocation, revives the first will. Where the second will contains a clause of revocation, it is held in many jurisdictions in the United States, in accordance with the distinction already given, that the destruction of the second will does not revive the first will. Page on Wills, section 273.

Authorities are cited in support of these views which need not be reproduced here, for we regard the statements of the text a correct exposition of most of the cases cited. See, also, Gardner on Wills, 271-274. Any reference to the authorities upon the subject would be incomplete without incorporating therein a citation to two cases which may well be regarded as leading ones upon this perplexing problem. These are *Pickens v. Davis*, 134 Mass. 252 (45 Am. Rep. 322), and *Williams v. Miles*, 68 Neb. 463 (94 N. W. 705, 96 N. W. 151, 62 L. R. A. 383, 110 Am. St. Rep. 431, 4 Am. & Eng. Ann. Cas. 306). Opinion by

Pound, C. This latter opinion carefully reviews all the decisions, both English and American, and finally adopts the rule of the ecclesiastical courts, making revivor of the former will a question of testator's intent, to be deduced from all the circumstances of the case. There is a valuable note to the case in 4 Am. & Eng. Ann. Cas., commencing at page 313. We may remark, parenthetically, that the English statute referred to, which was passed in the year 1837, is no part of our written law, and can not be considered as a part of the common law which we inherited at the time of the Revolution.

It should also be noted that we have no local statute upon the subject of the effect to be given the destruction of a second will upon a former one, which is yet preserved. We have already copied the section  
3. SAME: cancellation of wills: statute. of our Code with reference to the revocation of wills, and it is deemed proper, in view of some claims made by counsel, to indicate our views with reference to the proper interpretation of that statute. In the first place, it indicates that wills may be revoked, either in whole or in part. Next it indicates that revocation may be made by cancellation or destruction, or by the execution of subsequent wills; and the cancellation referred to is a written one, which must be executed in the same manner as the making of a new will. This may be then simply an instrument of cancellation or revocation, or it may be a part of another and subsequent will, which contains an express clause of revocation. The word "cancellation" may have had a different meaning at common law, but in our statute it manifestly means revocation by a written instrument. Again, physical destruction of a will amounts to a revocation, when so intended by the testator. Again, a will may be revoked under this statute, either in whole or in part, by the execution of subsequent wills. This follows when there is an inconsistency between the two wills, and there is no express revocatory clause. See,

as sustaining this view, *Fry v. Fry*, 125 Iowa, 424; *Schlinger v. Bawek*, 135 Iowa, 131; *In re Will of Dunahugh*, 130 Iowa, 692; *McCarn v. Rundall*, 111 Iowa, 406; *In re Brown's Will*, 143 Iowa, 649. These matters are pointed out in order that we may distinguish, harmonize, explain, and, perhaps, criticise some of the cases relied upon by appellee. If a will be revoked by destruction, as by burning, and a second one is executed in its place, there is nothing to revive upon the destruction or revocation of the second one. A will once executed may be revoked by the execution of an instrument of revocation or cancellation, and this instrument may be a new will, containing an express clause of revocation, or by an instrument of revocation alone.

Upon the execution of such an instrument, the prior will is revoked, no matter whether the instrument of revocation be probated or not. It is the execution of the in-

4. SAME.                   strument in proper form which effectuates the revocation. This view is sustained by reason and the weight of authority, although disapproved by a minority of the courts. See, as sustaining the rule, some of our own cases already cited and the following from other jurisdictions: *In re Barnes' Will*, 70 App. Div. 523 (75 N. Y. Supp. 373); *Brown v. Brown*, 8 El. Bl. 876 (92 Eng. C. L. 876); *Matter of Cunningham*, 38 Minn. 169 (36 N. W. 269, 8 Am. St. Rep. 650); *Stevens v. Hope*, 52 Mich. 65 (17 N. W. 698); *Cheever v. North*, 106 Mich. 390 (64 N. W. 455, 37 L. R. A. 561, 58 Am. St. Rep. 499); *Marsh v. Marsh*, 48 N. C. 77 (64 Am. Dec. 598). Clearly this is the doctrine heretofore announced by us in *McCarn v. Rundall*, and *In re Dunahugh's Wills*, *supra*.

If revocation, either in whole or in part, is to be implied from the execution of a second will, this revocation does not become effective if the second will

5. SAME.                   is destroyed or revoked before probate, for the reason that every will, as such, is ambulatory in

character, and if not in existence at the time of testator's death, and there being nothing to probate except the original will, there is no inconsistency and no revocation by implication. This is the doctrine of the Connecticut and other courts, although, as we think, they unduly extend it by making it apply to instruments expressly revoking prior wills. Doubtless the reason for this was to find some ground upon which to base the doctrine of revivor, although not calling it by that name. See *Peck's Appeal*, 50 Conn. 562 (47 Am. Rep. 685), as explained in *Blakeman v. Sears*, 74 Conn. 516 (51 Atl. 517); *Stetson v. Stetson*, 200 Ill. 607 (66 N. E. 262, 61 L. R. A. 258); *Flintham v. Bradford*, 10 Pa. 90; *Randall v. Beatty*, 31 N. J. Eq. 643; *Sewall v. Robbins*, 139 Mass. 164 (29 N. E. 650).

In the instant case, there was an express revocation of the former will in the one executed in the year 1904. But this second will, containing the revocatory clause, was destroyed by burning. The first will had not been destroyed, but had been kept by the testatrix, and at the time of the burning of the second there is no doubt, under the testimony, that she intended to revive the first. To be logical and consistent, we must hold that the second will, when executed with its clause of express revocation, revoked or canceled the first will, and we are required now to formulate a rule with reference to the revivor of the first will by reason of the destruction of the instrument of revocation. The safest doctrine, we think, is that announced by the ecclesiastical courts of England, to the effect that it is a question of testator's intent, to be gathered from admissible parol testimony. It would not do to hold that the former will was absolutely revived by the destruction of the second, for that may have been entirely contrary to testator's intent. Having made the second will, and laid aside and, perhaps, forgotten the first, it would be dangerous to hold that the destruction of the second *ipso facto* revived the

6. SAME: revivor:  
evidence.

first, no matter if testator did not so intend. On the other hand, it would in many cases frustrate testator's intent, were we to hold that the former will could only be revived in such case by a re-execution or a republication thereof after the destruction of the second will, which had not been admitted to probate, and which could not be, because of its destruction. There is no danger, then, it seems to us, in holding it to be a question of testator's intent, to be arrived at from all the circumstances in the case. Testimony to establish such intent could only come from disinterested witnesses, and we can perceive of no harm which would result in submitting such question as one of fact.

In the construction of wills, testator's intent has always been regarded as controlling, and so with reference to what should be regarded as his will. There can be no valid objection to a rule leaving the question of revivor in such cases as this to be found as a matter of intent upon permissible parol testimony.

Declarations of testator at the time of revoking a will have generally been admitted, when testified to by disinterested parties. *Boyle v. Boyle*, 158 Ill. 228 (42 N. E. 140); *Behrens v. Behrens*, 47 Ohio St. 323 (25 N. E. 209, 21 Am. St. Rep. 820); *Steinke's Will*, 95 Wis. 121 (70 N. W. 61). Even where a contrary rule prevails, admissions are admissible when part of the *res gestae*. *Caeman v. Van Hacke*, 33 Kan. 333 (6 Pac. 620); *Hayes v. West*, 37 Ind. 21; *Waterman v. Whitney*, 11 N. Y. 157 (62 Am. Dec. 71); *Townshend v. Howard*, 86 Me. 285 (29 Atl. 1077); *Pickens v. Davis*, *supra*; *Williams v. Williams*, 142 Mass. 515 (8 N. E. 424). These are the conclusions announced in *Barksdale v. Hopkins*, 23 Ga. 332; *McClure v. McClure*, 86 Tenn. 174 (6 S. W. 44); *Carpenter v. Miller*, 3 W. Va. 174 (100 Am. Dec. 744); *In re Gould*, 72 Vt. 316 (47 Atl. 1082); *Rise v. Scott*, 88 Minn. 386 (93 N. W. 109); *Colvin v. Warford*,

20 Md. 357; *Lane v. Hill*, 68 N. H. 275 (44 Atl. 393, 73 Am. St. Rep. 591).

We do not think there is any presumption one way or the other from the destruction of the instrument of revocation. The whole matter is one of fact, dependent upon the testimony which may be offered to show testator's intent. This is the rule announced by the later and better authorities, as shown in *Williams v. Miles*, *supra*, and the one best calculated to effectuate justice. It is the rule by statute in New York and Indiana. See *In re Forbes' Will* (Sur.) 24 N. Y. Supp. 841; *Kern v. Kern*, 154 Ind. 29 (55 N. E. 1004). The result of its application to the case at bar is to affirm the judgment of the court below, and it is so ordered.—*Affirmed*.

SHERWIN, C. J., concurs in the result reached herein.

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PETER HEIM and FRANK HEIM, JR., Appellants, v. GUSTAF RESELL and AUGUSTA RESELL.

**New trial:** NEWLY DISCOVERED EVIDENCE. An application for new  
1 trial on the ground of newly discovered evidence made after  
expiration of the three days should be by petition, and should  
be supported by evidence and not merely by affidavits, as where  
a motion for new trial is made within the three days.

**Same:** DILIGENCE: EVIDENCE. In a proceeding on petition for new  
2 trial on the ground of newly discovered evidence, the petitioner  
must show diligence in seeking to discover and procure the same:  
And where it appeared that the necessity of the evidence was  
as apparent upon the trial as afterward, that the witnesses were  
convenient, and the party made no attempt to procure their attend-  
ance or to procure a suspension or continuance of the trial for  
that purpose, such a showing of diligence as will support the  
application was not made.

**Appeal:** AMENDED ABSTRACT: MOTION TO STRIKE. A motion to strike  
3 an amended abstract because not filed in time will be overruled,  
where it appears that the same was submitted simply as the basis  
for a motion to dismiss the appeal.

*Appeal from Allamakee District Court.*—HON. L. E. FELLOWS, Judge.

MONDAY, DECEMBER 18, 1911.

THIS is a proceeding on a petition for new trial of an action between the same parties, in which there was a verdict and judgment for the defendants. The petition was supported by affidavits, and on a hearing the lower court dismissed the petition. Plaintiffs appeal.—*Dismissed.*

*H. H. Stilwell* and *Douglas Deremore*, for appellants.

*W. S. Hart*, for appellees.

MCCLAIN, J.—In the former action, retrial of which is asked in this petition, the allegations of plaintiffs were that defendants were indebted to them in the sum of \$108.95 for money loaned by plaintiffs to defendants, with interest thereon; and in the separate answers of defendants the allegations of the petition were denied, and it was alleged that defendants never had with plaintiffs, or with any one acting for them, any transactions out of which the indebtedness sued for arose, or ever received or retained any money belonging to plaintiffs, not fully accounted for. The issues in that trial were submitted to a jury under the evidence presented, and there was a verdict and judgment for the defendants. In the course of the trial, there was a contention for defendants that a sum of money had been paid to plaintiffs by defendants, and to sustain the testimony for defendants in this respect they attempted to account for the possession of money from which such payment could have been made, by testifying to the receipt of various sums of money from different sources. In support of the present petition for new trial, plaintiffs proposed to show that the testimony of the defendants on the

former trial, as to the sources from which these various sums of money were received, was untrue, and in support of the petition affidavits were presented to the lower court of the persons from whom defendants claimed to have received the money that such sums of money were not in fact paid to defendants. The trial court dismissed the petition for new trial, but whether on the ground that no competent evidence in its support was offered, or on the ground that there was no sufficient showing of reasonable diligence to procure such evidence on the former trial, does not appear.

I. Newly discovered material evidence, which could not with reasonable diligence have been discovered and produced at the trial, may be the basis for a new trial under Code, section 3755. In general, motions for new trial must, under the provision of Code, section 3756, be made within three days after verdict, "except for the cause of newly discovered evidence." But, if the application for new trial is made on the ground of newly discovered evidence after the expiration of three days, it should be by petition, as provided in Code, section 4092. *First National Bank v. Murdough*, 40 Iowa, 26. The provisions as to petition for new trial within one year are found in Code, section 4091, in which various grounds are specified, none of them in terms referring to newly discovered evidence; and in Code, section 4092, it is provided that application for such new trial shall be made by petition, as in an original action, and that "the facts stated in the petition shall be considered as denied without answer and tried by the court as other actions by ordinary proceedings." The contention for appellees is that a motion for new trial on the ground of newly discovered evidence, made after three days, but within a year, is to be determined on evidence offered, as in other cases of petition for new trial under Code, section 4091, and that, as in this case the motion or peti-

1. NEW TRIAL:  
newly discovered evidence.

tion, whichever it may be called, was supported only by affidavits, and not by evidence offered, there was no basis on which the lower court could have granted plaintiffs any relief; while the contention for appellants is that a motion for new trial on the ground of newly discovered evidence, although made after three days, if presented within a year, may be supported by affidavit to the same effect as though it were made within three days after the verdict, provided, of course, that reasonable diligence is shown in not discovering the evidence in time to have presented it on the original trial. This exact point seems not to have been expressly ruled upon in any of our cases. In *Hunter v. Porter*, 124 Iowa, 351, there was a petition for new trial on the ground of newly discovered evidence, and the court heard testimony in accordance with the provisions of Code, section 4092; and it is said in the opinion, in answer to the objection that the application should have been by motion, and without expressing any opinion as to whether the proper procedure was by motion or petition, that there was no error in proceeding on the petition to hear evidence in its support. In *Scott v. Hawk*, 105 Iowa, 467, there was a demurrer to the petition for new trial, based on the ground of newly discovered evidence, and it is assumed that reasonable diligence must be alleged and proved in such a case. Although the court refers to affidavits in support of a motion for new trial on the ground of newly discovered evidence, there is a quotation in the opinion from *Woodman v. Dutton*, 49 Iowa, 398, in which it is stated that the facts showing diligence may, in support of a motion, be shown by affidavits, but that, on a petition for a new trial, which must be supported by evidence in the ordinary way, it is sufficient as against a demurrer to allege reasonable diligence; the subject being one for proof. We think the plain intimation, therefore, is that on a petition for new trial on the ground of newly discovered evidence the alle-

gations of the petition are to be supported by evidence, and not by affidavits. We do not regard it as very material whether the proceeding is instituted after three days, and within a year, by motion or by petition. The determination of the question presented is to be by the court as in ordinary proceedings, and therefore upon evidence, and, of course, affidavits do not constitute evidence, and are not receivable in evidence, unless as authorized by some statutory provision. Our conclusion is that when an unsuccessful party desires to secure a new trial on the ground of newly discovered evidence, by a proceeding instituted otherwise than within three days, as provided in Code, section 3756, he must support his allegations by evidence, and that affidavits which might have been received on a motion for a new trial, filed within three days, are not competent or sufficient in themselves to sustain his allegations. The record does not present any evidence offered by appellants in support of their application for new trial in this case, and the trial judge was justified, therefore, in dismissing the application.

II. The only showing of diligence is the statement in the affidavit of counsel for plaintiffs that he did not discover the falsity of the testimony of defendants as witnesses on the first trial, in regard to the receipt of sums of money by them, until after the expiration of the three days allowed for filing a motion for new trial, when, in taking their depositions with reference to another matter, they made admissions inconsistent with such testimony; and that he could not with reasonable diligence have discovered the matter sooner, or in time for the first trial. Counsel offer on this trial the affidavits of the persons from whom defendants, as they testified on the first trial, received the sums of money, to show that they did not receive such money, and affiants say they are ready to testify as witnesses to that effect. But it is apparent that when the defendants

2. SAME: diligence; evidence.

testified on the original trial that they received certain sums of money from certain specified persons who, as it appears, lived in the neighborhood, and might have been summoned as witnesses, it was plainly incumbent on plaintiffs' counsel, if he deemed it material to meet such testimony, that he call such persons as witnesses, if he was able to secure their attendance, and ascertain the truth as to the matters involved in defendants' testimony. He might have asked a brief suspension of the trial, in order that such witnesses might be brought in, or, if he ascertained that their testimony was material to his case, and he could not secure their attendance, he might have asked for a continuance; and, finally, he might, within the three days allowed for filing a motion for new trial, have ascertained the facts, and presented the affidavits of these witnesses in support of such motion. In that connection, such affidavits would have been plainly competent. The need and bearing of the testimony offered by affidavits in support of the application was as apparent when these defendants testified on the first trial as it is now; and the witnesses by whom such testimony could be contradicted, if it was not true, were then plainly indicated. There is no allegation of fraud, by which plaintiffs were misled into the omission to call such witnesses, nor is there any showing of accident or mistake or casualty preventing a full development of plaintiffs' case upon the original hearing. Under such circumstances, we have often sustained the refusal of the lower court to grant a new trial. *Kringle v. Kringle*, 123 Iowa, 365; *Renshaw v. Dignan*, 128 Iowa, 722; *Benjamin v. Flitton*, 106 Iowa, 417; *Heathcote v. Haskins*, 74 Iowa, 566; *Bailey v. Landingham*, 52 Iowa, 415; *Dettman v. Zimmerman*, 53 Iowa, 709; *Dunlavey v. Watson*, 38 Iowa, 398; *Hopper v. Moore*, 42 Iowa, 563; *State v. Morgan*, 80 Iowa, 413; *Mehan v. Chicago, R. I. & P. R. Co.*, 55 Iowa, 305. There was no such showing of diligence to discover the evidence now relied upon, and to pro-

cure the attendance of witnesses, as would have justified the trial court in sustaining plaintiffs' application.

The motion of appellants has been submitted with the case, in which it is asked that appellees' denial of appellants' abstract and their amended abstract be stricken from the files, because not filed in time. As the amended abstract is submitted only as a basis for a motion by appellees to dismiss the appeal, appellants' motion to strike it must be overruled. It seems to serve no purpose in the case, save as a basis for such motion. Appellees' motion to dismiss is also submitted with the case. It raises some of the questions which have been discussed. We have preferred to treat them as arising on the merits of appellants' application for a new trial. Without such motion, the action of the lower court would have been affirmed, but, as the objections are properly presented by the motion, we can reach the same result by sustaining it.

The appeal is therefore *dismissed*.

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THE FEDERAL CONTRACTING Co., Appellant, v. THE BOARD OF SUPERVISORS OF WEBSTER COUNTY, IOWA, and others.

**Mandamus: NATURE OF WRIT.** The office of mandamus is to compel  
 1 an officer to take some action regarding a matter of which he has supervision, but if the same involves an exercise of judgment or discretion the court will not undertake to control the conclusion or result of his action, unless fraud and collusion are made to appear. Thus mandamus will not lie to compel a drainage engineer and board of supervisors to approve the performance of a drainage contract and to levy an assessment therefor, where the refusal to approve the same was based on a mere error; as whether the contract had been fully performed.

**Same: BURDEN OF PROOF.** One alleging that refusal of drainage offi-  
 2 cers to approve a drainage contract and levy an assessment there-

for was collusive and fraudulent has the burden of proof on that issue.

**Same: DENIAL OF WRIT: PROCEDURE.** In mandamus proceedings to  
3 compel the acceptance of a drainage project and the levy of an assessment therefor, in which the relator sought recovery on the contract only and not upon *quantum meruit*, and he was not entitled to mandamus because the contract had not been fully performed, the order denying the writ will be affirmed and the cause remanded for the purpose of allowing the relator to amend his pleading and try out his right to recover on *quantum meruit* in a law action.

*Appeal from Webster District Court.*—HON. R. M. WRIGHT,  
Judge.

MONDAY, DECEMBER 18, 1911.

PLAINTIFF asks a writ of *mandamus*, requiring the board of supervisors to levy an assessment upon the lands within a certain drainage district for the payment of the cost of the ditch, and for other relief. The trial court denied the relief sought, and plaintiff appeals. The facts, so far as material for the disposition of the appeal, are stated in the opinion—*Affirmed and remanded.*

*Healy & Healy*, for appellant.

*Kenyon, Kelleher & O'Connor, F. A. Grosenbaugh,*  
and *M. J. Mitchell*, for appellees.

WEAVER, J.—Drainage district No. 5, in Webster county, having been duly established, the contract for constructing the ditch was let to the plaintiff at a stated price per cubic yard of excavation. Eighty percent of the compensation thus agreed upon was to be paid as the work progressed upon monthly estimates made by the engineer in charge of the construction. Concerning the remaining twenty percent of the sum thus earned, the contract pro-



for was collusive and fraudulent has the burden of proof on that issue.

**Same: DENIAL OF WRIT: PROCEDURE.** In mandamus proceedings to  
3 compel the acceptance of a drainage project and the levy of an assessment therefor, in which the relator sought recovery on the contract only and not upon *quantum meruit*, and he was not entitled to mandamus because the contract had not been fully performed, the order denying the writ will be affirmed and the cause remanded for the purpose of allowing the relator to amend his pleading and try out his right to recover on *quantum meruit* in a law action.

*Appeal from Webster District Court.*—HON. R. M. WRIGHT,  
Judge.

MONDAY, DECEMBER 18, 1911

PLAINTIFF asks a writ of *mandamus*, requiring the board of supervisors to levy an assessment upon the lands within a certain drainage district for the payment of the cost of the ditch, and for other relief. The trial court denied the relief sought, and plaintiff appeals. The facts, so far as material for the disposition of the appeal, are stated in the opinion—*Affirmed and remanded.*

vided that, "when said improvement is completed to the satisfaction of the engineer in charge of the work and accepted by the board of supervisors of Webster county, the engineer shall certify such facts to the county auditor and the county auditor shall draw a warrant for the balance due from Webster county."

Plaintiff alleges that it excavated the ditch according to contract; that the same was done under the charge and direction of engineers appointed by the board of supervisors for that purpose; that said engineers made and reported monthly estimates of the work done during the period of its prosecution; and that upon said estimates plaintiff has been paid eighty percent of the contract price for its services; but, notwithstanding the entire work called for by said contract has been fairly and fully performed in the manner provided by said agreement, the defendants refuse to pay the remaining twenty percent of the stipulated compensation, or to issue warrants therefor, or to make assessment upon the drainage district to provide the means for such payment. It is further alleged that defendants, with some of the property owners within the district, have wrongfully conspired to cheat and defraud the plaintiff out of the unpaid remainder of the contract price for the work, and that in pursuance of such unlawful confederation the county engineer, who is made a party defendant, has corruptly and without cause refused the plaintiff's demand that he certify to the county auditor the completion of the ditch according to contract. It is still further charged that as part of said alleged conspiracy the supervisors of said county wrongfully agreed that, notwithstanding any certification which might be made by the engineer of the entire performance of the contract, they would not perform the duty imposed upon them by law to order the issuance of warrants for the payment due to the plaintiff. It is also charged that the objections made before the board of supervisors to the payment of

plaintiff's claim have not been made in good faith, but in pursuance of a conspiracy to cheat and defraud the plaintiff. It is also alleged that moneys raised and appropriated for the construction of the ditch are now in the treasury of the county, and subject to warrant thereon for the payment of the claim in suit. *Mandamus* is therefore prayed to compel the engineer to issue certificates to the auditor and board of supervisors of the completion of the ditch according to contract, and to compel the auditor to issue his warrant for the payment of the balance due to the plaintiff; and, in the event that funds liable to such payment are not found in the hands of the treasurer, then the board of supervisors be directed to make the proper levy, or to sell the necessary bonds to provide means with which such warrant may be paid.

The defendants concede the execution of the contract with the plaintiff, and the performance by the latter of a large amount of work in the construction of the ditch, and the payment thereof of at least eighty percent of the stipulated price. They deny that the work has been completed according to contract, or that plaintiff is entitled to demand or receive the remainder of the contract price, or any part thereof. They also deny all charges of conspiracy and wrongdoing. They further aver that the plaintiff's work, so far as done, has been performed in a negligent and unskillful manner; that the width of the berm provided for in the contract has not been left as agreed upon, with the result that much of the dirt and sods thrown out of the ditch have fallen or been washed by the rains back into the excavation; that the slope of the banks of the ditch has been made much steeper than was agreed upon; that in many places the ditch as made is less in cross section than is called for by the contract, and overhanging sods and dirt have not been removed; that the bottom of the ditch has been left in rough and irregular condition, and not in accordance with the grades, plans, and specifications

provided for the guidance of the plaintiff. It is also alleged that by the terms of the contract the plaintiff undertook and agreed to keep each mile of the ditch in good condition and repair at its own expense until the same was finally accepted by the parties of the first part, each mile to be accepted by the first parties when completed according to the specifications and terms of the contract; but defendants charge that plaintiff has wholly failed in the performance of this duty, and aver that no mile of said ditch has even been accepted, and that no mile of its course has in fact ever been completed or kept in repair according to the contract. Other matters are pleaded, but sufficient has been stated for the purposes of this opinion.

The engineer, answering separately, takes issue upon the allegations of the petition as against himself, and denies the completion of the work, setting out numerous details with respect to which the plaintiff is alleged to have failed in the due performance of its contract. A very large amount of testimony was heard, and at the close of the trial the court found the plaintiff not entitled to the relief prayed for, and dismissed the petition.

In nearly all essential particulars, this case is quite parallel in fact and circumstance with that of *Littell v. Webster County*, reported in 152 Iowa, 206, and reference thereto will sufficiently disclose the view taken by this court of the law applicable to issues of this nature. There is no occasion, therefore, for us to repeat the discussion there found, or to review again the authorities cited by counsel.

It was there held that, assuming *mandamus* to be under some circumstances an available remedy to control the action of a drainage engineer and board of supervisors, who refuse to approve the work of a contractor, it must be limited to cases where fraud is shown, and that it will not lie to review errors of judgment on part of such officers. It requires

1. MANDAMUS:  
nature of writ.

but little reflection to see the justice and propriety of this rule. Generally speaking, the sole office of *mandamus* is to compel the officer to whom it is directed to act, and if the thing which he neglects to do involves the exercise of judgment or discretion it is not within the province of the court to prescribe or order the result or conclusion at which he must arrive. In other words, while it may compel him to act, it can not control his judgment. His judgment may be erroneous, and the conclusion at which he arrives may be radically wrong, but the remedy of the party suffering prejudice therefrom is not to be found in *mandamus*. If in fact he has acted, and fraud and collusion are not made to appear, then nothing is left to which such proceedings are applicable. In point upon this discussion, see *Woodbury Co. v. Talley*, 147 Iowa, 498.

Apparently recognizing the force of this proposition, plaintiff charges specifically that in refusing to approve the work and to pay for the same defendants did act corruptly and in pursuance of a conspiracy to cheat and defraud the plaintiff, well knowing that the work had in fact been done in full accord with the contract. This is a serious charge, and the burden of establishing it by proof is upon him who makes it. A review of the record leads us to agree with the trial court that there is a failure of proof in this regard, and therefore *mandamus* was properly refused. It may be true that defendants have shown a disposition to be unduly technical, and to seek grounds for fault-finding in matters of minor import, which they had given plaintiff reason to think would not be insisted upon, and that for other things for which plaintiff is not at fault they seek to hold it responsible; but these are the familiar tactics of parties engaged in legal strife, and are not necessarily evidence of corruption or bad faith. A good defense to an action on the contract is pleaded, and evidence is offered in its

2. SAME: burden  
of proof.

support. Whether the defense has been established, we need not undertake to determine.

We have here, upon part of plaintiff, a demand for *mandamus*, requiring the payment of the contract price for work done. This demand is met by an admission of the contract and of work partly performed thereunder, but alleging that the agreement is yet unperformed in many respects of more or less importance, by reason of which plaintiff has no right to invoke *mandamus*. No relief is asked on a *quantum meruit*. It is manifest that the record does not present a case in which, having denied *mandamus*, we can award a recovery on the contract, or on *quantum meruit*. For the trial of such issues, actions at law or in equity, according to the relief sought, are authorized by our system of procedure. The aid of *mandamus* or other extraordinary writ is not required. If, however, on trial being had, the plaintiff is found entitled to recover, and defendants shall then persist in refusing to pay or to provide funds for that purpose, all appropriate writs to compel compliance with the judgment will be available to the plaintiff.

Such being our view, there is no occasion to dwell upon the many other propositions advanced by the appellant, and supported by the elaborate and well-prepared briefs of counsel. While we are agreed that the decree below must be affirmed, in so far as it denies the writ of *mandamus*, we are still disposed to follow the precedent afforded by our order in *Littell v. Webster County*, 152 Iowa, 206, and remand the case to the court below, with right to the parties to amend their pleadings, if so advised, and for the trial by appropriate methods of the question whether plaintiff is entitled to recover upon its contract, or upon *quantum meruit*, any part or all of the agreed compensation which, it is conceded, is still withheld by the defendants. As thus modified, the decree of the district court is *affirmed* and the cause *remanded*.

3. SAME: denial  
of writ: pro-  
cedure.

HAMILTON NATIONAL BANK, Appellant, v. G. W. NICHOLSON and W. E. SHOTWELL.

**Compromise and settlement:** CONSIDERATION. Where notes were settled in full before maturity by part payment, and in effecting the settlement property was turned over by the debtor when the same might have been retained by him and the proceeds turned to other creditors, the settlement was supported by a sufficient consideration and the debtor and his guarantors were discharged.

*Appeal from Crawford District Court.*—HON. Z. A. CHURCH, Judge.

MONDAY, DECEMBER 18, 1911.

ACTION on a guaranty of indebtedness. The defendants relied upon a settlement and release. There was a verdict for defendants, and from judgment thereon plaintiff appeals.—*Affirmed.*

*George McHenry and Conner & Lally*, for appellant.

*Stevens & Fry and Shaw, Sims & Kuehnle*, for appellees.

MCCLAIN, J.—In the year 1905 a corporation known as Shotwell, Davis & Co., which was then carrying on the commission business in Chicago, for the purpose of securing credit with the plaintiff, a bank of that city, delivered to the plaintiff two guaranties signed, respectively, by these defendants, who were stockholders in said corporations; the undertakings of the guarantors, respectively, being to pay to the bank promptly at maturity, and without notice or demand, all debts and liabilities of the corporation then

existing or to be thereafter contracted, and it was stipulated that such obligation should continue until terminated by written notice. On the 22d day of October, 1907, the instruments of guaranty having continued in force in the meantime, the indebtedness of the corporation to the bank exceeded \$8,000, evidenced in part by a demand note of \$1,000 dated in the previous March, a note for \$3,000 dated September 5th of the same year, due in ninety days, and a demand note for \$3,600 dated the 18th of the same month, secured by the deposit of collateral which the bank was authorized to sell. Thereupon it was proposed by officers of the corporation that they turn over for it to the bank two carloads of eggs, and apply on the indebtedness the deposit then in the bank to the credit of the corporation, provided the bank would release the defendants as guarantors from their obligation, and surrender to the corporation the three promissory notes already described and some other evidences of indebtedness which need not here be specifically referred to. This proposition was accepted by the officers of the bank, and the corporation in consideration of credit in an amount not exceeding \$5,000 was relieved of its obligations in total exceeding \$8,000, and the instruments of guaranty were canceled. The canceled instruments were retained in the possession of the bank, but the explanation as to the reasons for such retention is not inconsistent with, and does not tend to disprove, the finality of the settlement then made.

The court found as matter of law, and instructed the jury, that plaintiff had a valid claim against the defendants on account of the indebtedness of the corporation to the bank when action was brought for \$3,458, unless the obligations of defendants had been canceled and discharged by the settlement above referred to, and left for the determination of the jury the sole question as to whether such settlement had in fact been made, casting upon defendants the burden of proof to show that there had been such full

and final settlement as alleged. The finding of the jury was for the defendants, and the jury returned an affirmative answer to a special interrogatory as to whether the credit given to the defendants was in full settlement of all claims then existing against the corporation in favor of the plaintiff.

The contention for the appellant is that part payment of the existing indebtedness was not a sufficient consideration for the release of the whole, and that, therefore, the defendants as guarantors were not discharged. The soundness of this proposition as a general rule can not be questioned, but it is equally well settled that some additional consideration, even though of slight money value, is sufficient to sustain such a settlement and discharge. We find such additional consideration in the fact that the notes released were not due at the time the settlement was made, and were therefore paid before maturity, and in the further fact that in effecting such settlement property was surrendered, the proceeds of which might have been retained by the corporation, and turned over to other creditors. That these additional elements of consideration were sufficient to sustain the agreement to settle and discharge the corporation and these defendants as guarantors is amply established by the authorities, among which we may cite the following cases decided in this court: *Marshall v. Bullard*, 114 Iowa, 462; *Brown v. Jennett*, 130 Iowa, 311; *Kerr v. Topping*, 109 Iowa, 150; *Engbretson v. Seiberling*, 122 Iowa, 522. The jury was correctly instructed as to the law and the verdict finds support in the evidence.

By stipulation on suggestion of the death of G. W. Nicholson, defendant, pending this appeal, his administrators, B. Y. Nicholson and May O. Nicholson, are substituted as of date October 17, 1911.

The judgment of the trial court is *affirmed*.

W. T. JOYCE COMPANY, Appellee, v. CARROLL LIGHT, HEAT  
& POWER Co., et al., Appellants.

**Mechanic's liens: PRIORITY: EVIDENCE.** An affidavit for a mechanic's  
1 lien setting forth the date of the contract for material and labor  
and of furnishing the same is substantial evidence on the issue of  
the date of the contract, in determining the priority of the lien  
over a conveyance of the premises, and in refuting oral evidence  
in an action to foreclose the lien, to the effect that the contract  
was made before the conveyance. In this action the evidence is  
held to show that the contract for material was made subsequent  
to a trust deed of the property giving the deed priority over  
the lien.

**Same: NOTICE OF LIEN.** The right of a grantee of premises who has  
2 acquired by the conveyance a title superior to that of a material-  
man under his lien is not affected by the question of notice of  
the lien.

*Appeal from Carroll District Court.*—HON. Z. A. CHURCH,  
Judge.

MONDAY, DECEMBER 18, 1911.

ACTION to foreclose a mechanic's lien. There was a  
decree for the plaintiff, and the defendants appeal.—*Re-*  
*versed.*

*Saunders & Stuart*, for appellants.

*Lee & Robb*, for appellee.

EVANS, J.—The question in controversy is one of  
priority of liens. The common debtor of the contending  
parties was the Carroll Light, Heat & Power Company.  
The controversy herein turns upon the question whether

the plaintiff's mechanic's lien can take priority over a trust deed executed by the debtor to the American Trust & Savings Bank. Before proceeding to a statement of the controlling facts in the case, a few preliminary matters should be stated in order to avoid confusion in the use of names. The electric lighting plant at the city of Carroll has been owned successively by three corporations, namely: (1) Carroll Electric Light & Power Company; (2) Carroll Light, Heat & Power Company; (3) Carroll Light & Power Company. The common debtor is the second of the above named. One Brown was the manager of the plant for several years under the ownership of the first two named corporations. The plaintiff is an Illinois corporation doing business in the city of Carroll as a lumber company, under the management of one James Thompson. Prior to the transaction involved in this case, it sold lumber and other materials to the lighting plant, and kept a current account therewith. The second corporation was organized in March or April, 1904. It was so organized for the purpose of taking over the lighting plant from the first-named corporation, and it became the purchaser of the same. On July 29, 1904, it executed a trust deed to the American Trust & Savings Bank to secure an issue of bonds to the amount of \$100,000. Such deed was duly recorded in Carroll county on August 4, 1904. In the latter part of the year 1904 this corporation began the erection of an addition to its building, and purchased material therefor from the plaintiff to the amount of nearly \$700. On July 6, 1905, the plaintiff duly filed a claim and statement for a mechanic's lien duly sworn to by the plaintiff's manager, James Thompson. In the affidavit so filed, it was averred that such material was furnished under a contract entered into August 30, 1904, and that the first item was furnished on the same date and the last on June 20, 1905. The sum total claimed was \$683.45. In September, 1905, the plaintiff filed another claim for mechanic's lien under a contract

alleged in the affidavit to have been made on July 14, 1905, and that the first item thereunder was furnished on July 14, 1905, and the last on September 25, 1905. On September 28, 1905, the plaintiff herein joined as coplaintiff with many other creditors in an action against the Carroll Heat, Light & Power Company, wherein it was alleged that the company was insolvent, and wherein it was prayed that a receiver be appointed to take over and manage its property, and to sell the same subject to the trust deed of the American Trust & Savings Bank. In such petition the plaintiff alleged that it held a mechanic's lien, and asked that the proceeds from the sale of the property be applied to the payment thereof. In pursuance of this petition, one Robb was appointed receiver. He took possession of all the property, and managed it, and finally sold it under the order of the court to one Collins. While managing the property he paid \$1,200 of interest on the bonds which were secured by the trust deed. The property was sold by such receiver subject to the trust deed for \$50, plus the expense of the receiver, amounting to about \$600 more. Such sale was approved by the court with the acquiescence of all the plaintiffs in such proceeding, and the formal transfer of the property was made to Collins on June 26, 1906, and the receiver was thereupon discharged. Up to this point the priority of the trust deed to the American Trust & Savings Bank over the mechanic's lien of this plaintiff had never been questioned, nor was the American Trust & Savings Bank a party to such receivership proceedings. On July 26, 1906, the American Trust & Savings Bank brought its action in the federal court at Council Bluffs to foreclose the trust deed. In such action the Carroll Light, Heat & Power Company, and Collins, the purchaser at receivership sale, were made parties defendant. In such action a decree was entered on July 15, 1907, establishing the superiority of the trust deed over the claims of the defendants. The plaintiff herein was not a

party to that suit. In pursuance of this decree the property was sold at master's sale to defendant Long. Long afterwards conveyed the same to the defendant Carroll Light & Power Company, and this corporation executed a trust deed to the Michigan Trust Company. On March 28, 1907, the plaintiff herein brought this action in the district court of Carroll county. On May 6, 1907, it obtained a decree in said court against the Carroll Light, Heat & Power Company and against Collins, and the cause was continued as to other defendants. The cause came on for trial as between the plaintiff, and the appealing defendants in December, 1908.

In its petition in this action the plaintiff claims that its mechanic's lien is prior and superior to the lien of the trust deed executed to the American Trust & Savings Bank. Such claim presents a change of position by the plaintiff, and is predicated upon a third affidavit filed on March 19, 1907, with the clerk of the district court, claiming a mechanic's lien as from July 7, 1904, and purporting to amend the former affidavit, which claimed a lien only from August 30, 1904. It is this shifting of dates by this amended claim that makes the controversy. As already indicated, the trust deed of the American Trust & Savings Bank was recorded on August 4, 1904. If the plaintiff's mechanic's lien rests upon a contract entered into August 30, 1904, the trust deed has priority. If such mechanic's lien rests upon a contract begun on July 7, 1904, then such lien takes priority. The appellants deny the claim of plaintiff that its contract was entered into on July 7, 1904. They also contend that the plaintiff elected its remedy in the receivership proceedings, and that Collins, as purchaser at the receivership sale, took the property free from plaintiff's lien, and that by the terms of the sale he purchased subject to the trust deed. On the other hand, the plaintiff contends that the appellants are not holding any rights under Collins, and are therefore not affected by the terms

of his purchase. The foregoing is a sufficient statement to show that we are confronted first with a question of fact, and this we will now proceed to consider.

I. Can it fairly be said upon this record that plaintiff's contract for material for the addition was made on July 7, 1904? It is urged by plaintiff that the evidence is undisputed to that effect, and that it must, therefore, be accepted. The only witnesses to the alleged transaction were Thompson as manager for the plaintiff and Brown as manager for the Light & Power Company. Brown died before the trial, and Thompson was the only witness to testify to the transaction. Thompson testified at the trial that Brown contracted with him for the material for an addition on July 7, 1904, and that he furnished a part of the material that day, and that all the material afterwards furnished by him, including that described in the second mechanic's lien, was furnished under that same contract. As against this, the appellants rely upon the two affidavits of Thompson filed July 6, 1905, and September 28, 1905, respectively.

These affidavits were filed in pursuance of a statutory requirement. They are specific as to dates and are clearly contradictory to the present claim. They must be regarded as substantial evidence upon the point at issue and as disputing the evidence of Thompson upon the trial. In the first of these it is stated that an oral contract was entered into on the 30th of August, 1904, and that the first item of the account was furnished on the 30th of August, 1904, and the last on the 20th of June, 1905. The second affidavit made claim for mechanic's lien for material furnished after July 14, 1905. It alleged that the contract for such material was made on July 14, 1905, and that the first item of the account was furnished on that date and the last on September 25, 1905. No satisfactory explanation is made of the discrepancy of dates between the original affidavit and the amended affidavit. Plaintiff's books were

1. MECHANIC'S  
LIENS: prior-  
ity: evidence.

introduced in evidence. The page of the ledger covering this period is as follows:

## CARROLL ELEC. L. &amp; P. CO.

Date.	Folio	Debits	Date	Folio	Credits.
1904-.			1904-		
June 8	230	1.65	July 6	75	4.45
" 14	14	.90			
" 20	30	1.00			
" 29	57	.90			
					4.45
July 7	75	.20	(Sept. 5- Bal. fr.)		141.84
" 7	80	.40			
" 12	91	.20			
" 14	95	.50			
" 16	101	18.95			
" 27	128	.50			
Aug. 6	156	1.30			
" 18	181	.15			
" 29	211	.70			
" 30	213	5.65			
" 30	213	.60			
" 31	216	66.61			
Sept. 1	1	1.45			
" 1	1	8.30			
" 2	5	2.70			
" 2	5	22.00			
" 2	7	5.25			
" 3	8	6.38			
		141.84			141.84

This was a part of the current account between the parties. It is manifest that the contract or order for material for an addition to the building might have occurred upon any of these dates. This account was in existence in this form when the original affidavits were made. The date then fixed upon was August 30th. Nothing is disclosed in the record which would make Thompson's recent recollection more reliable than his first. He does claim that the fact that the account was balanced on the 6th of July aids his memory as to the date of the contract, but that fact was as prominent at the first as at the last. The items

actually furnished between July 7th and August 30th are as follows:

1904.

July 7	2 lbs. Nails.....	\$0 20
	1 1-10 8 Finish.....	40
12	To 20 lbs. Fire Clay.....	20
14	To 2 2x6 10.....	50
16	To 12 sax Cement.....	9 00
	To 12 Sax.....	1 20
	3 6-6 144 8 2-12 12 192 336.....	8 75
27	To 50 lbs. Fire Clay.....	75
Aug. 7	11 wide select.....	75
	1 1-14 12 select.....	55
18	3 select.....	15
29	6 1-4 12 Fence.....	70

These items appear regularly upon the plaintiff's books. The books are not impeached by any appearance of tampering. None of these items were included in the original statements of account for mechanic's lien. No explanation of such omission is attempted in this record, and we can only presume that they were omitted because they antedated the contract for material for the proposed addition. Thompson did testify in a general way that everything was furnished for the building of the addition. On cross-examination he testified as follows:

I am the man that verified or made the affidavit attached to the three mechanic's liens that were filed. The first one was verified by me on the 6th of July, 1905, the next one was made by me on the 21st day of September, 1905, and the next one was made on the 19th day of March, 1907. Q. Now, how did it happen that your recollection was so much better on the 19th day of March, 1907, in reference to when that oral contract was made than it was in July or September, 1905? A. I could not tell you. Q. How did it happen that you didn't put these items into the affidavit that you made on the 6th day of July, 1905;

that is, those items covering the months of July and August, 1904? A. It was an error in making out the bill. It ought to have went back from the time that statement was. I think it was in July that he paid me the little amount there. Q. You were the bookkeeper at that time? A. Yes, sir. Q. You were the manager? A. Yes, sir. Q. Now, didn't you and don't you know as a matter of fact, Mr. Thompson, that Mr. Brown didn't commence the rebuilding of that plant until the last days of August, 1904? A. That may be. Q. And these little items that were bought during July and August were simply little items that were bought from time to time for use in the plant? A. They were used in the building. Q. But not for the rebuilding of the building? A. May not have been for the rebuilding, but they were used for the building. Q. That is, they were used in the plant there? A. Yes. Q. Now, let me ask you this question: Wasn't your recollection better as to the time when the oral contract was made on the 6th of July, 1905, than it was on the 19th of March, 1907? A. Yes; I suppose it would be. It naturally would be. Q. You claim now that you made that mistake of locating the time of making that contract as the 30th day of August, instead of the 6th day of July, 1904? A. No; I think the oral contract was in July. Q. You said on the 6th of July, 1905, did you not, under oath, that it was made on the 30th day of August, 1904? A. Yes; I guess I did. If it is right there, it shows. Q. As a matter of fact, Mr. Brown didn't have the plans there for the proposed changes and rebuilding of the plant until August, 1904, did he? A. I don't know that he ever had any plans; I never saw any. Q. Don't you know that he didn't start the rebuilding of that plant until August 30, 1904? A. I can't tell you what time it was started. Q. Don't you know it was about that time, and wasn't that one of the reasons why you fixed the time of the making of that oral contract for that first affidavit as the 30th day of August, 1904, when he bought the first big bill of stuff? A. Well, he made an oral contract before that bill was bought. Q. Yes; but the reason you fixed the time at the 30th of August was because it was just before the big bill was bought that he made the arrangement, wasn't it, Mr. Thompson? A. That might have been.

Considering the evidence as a whole, it is quite evident that the present recollection of the witness Thompson upon which the amended affidavit is based is argumentative, and mere conclusion. He does not remember that July 7th was the date of the contract, but he is satisfied from an examination of the books that it must have been such date. As against such a conclusion, there must have been some reason why August 30, 1904, was fixed as the date of the contract when the first lien was filed. The true date was more readily ascertainable then than later. Brown, the manager of the light company, was then living, and was presumably interested in the statement of a correct date. This consideration is emphasized by the conduct of the parties throughout the receivership proceedings wherein the priority of the trust deed was recognized at all times without question. If after such long acquiescence a new date is to be put forward which reverses the rights of the parties, the evidence of a mistake ought to be more clear and satisfactory than appears in this record. Without imputing to the witness Thompson any bad faith in his present conclusion, we reach the conclusion that the proof in support of the amended affidavit is not sufficient, and that the plaintiff's mechanic's lien must rest upon the affidavits originally made. Our conclusion of fact announced in the foregoing division is decisive of the case.

The appellee plaintiff urges upon our attention that the present owner of the plant and the Michigan Trust Company acquired their rights with notice of plaintiff's  
 2. SAME: notice of lien. pending suit, and that they are precluded thereby from questioning the priority of the mechanic's lien. If the rights of such appellants were dependent upon want of notice, then appellee's contention would be entitled to consideration. But the rights of such appellants exist quite independent of the question of notice. They are not asking protection as innocent purchasers. They stand here on a question of right, regardless of no-

tice. They have acquired their title through the trust deed of the American Trust & Savings Bank. If such lien was superior to the lien of the appellee plaintiff, then the rights of the purchasers thereunder are superior also. The question of notice or want of notice therefore is not an element in the appellants' case. Other questions argued by counsel need not be discussed.

The decree of the court below must be, and is, *reversed*.

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STATE OF IOWA, Appellee, v. EDGAR SKAGGS, Appellant.

**Criminal law: BURGLARY: CONFESSION: EVIDENCE.** Admission by de-

1 fendant of a fact competent in establishing his guilt of the crime charged may not be equivalent to a confession of the crime: Thus where defendant charged with burglary was told by the officer that the state had positive proof of his guilt but that if he would give up the stolen property it would save the necessity of locking him up and procuring a search warrant, and without protest he produced the stolen property, his admission of the theft was not a confession of the burglary, though competent evidence thereof; nor was it the result of duress.

**Same: EVIDENCE.** The admission of evidence not tending to connect

2 a defendant with the crime charged is not prejudicial: Thus the statement of defendant when arrested that if the officer would ease up on him he could furnish him with valuable information concerning matters in the community, was not prejudicial.

**Same: CONDUCT OF ACCUSED: CROSS-EXAMINATION OF ACCUSED.** Where

3 a defendant has made no claim that he was influenced by fear to make certain statements respecting his connection with the crime charged, the cross-examination of a witness who had detailed the statements, which failed to direct the attention of the witness to any particular statement, was properly refused.

**Same: INSTRUCTION: INFRINGING ON PROVINCE OF JURY.** On a prose-

4 cution for breaking and entering in which the defendant claimed to have entered the building through an opening already made, an instruction that the jury should consider the defendant's testimony and also the evidence as to how the opening was made, and whether it was reasonable that a person would make an opening large enough to go through unless intending to enter the

building, while argumentative and intrenching on the province of the jury, is held to have been without prejudice.

*Appeal from Page District Court.*—HON. W. R. GREEN,  
Judge.

MONDAY, DECEMBER 18, 1911.

THE defendant appeals from a judgment of conviction entered against him on a charge of burglary.—*Affirmed.*

*Earl R. Ferguson* and *C. R. Barnes*, for appellant.

*George Cosson*, Attorney-General, and *John Fletcher*, Assistant Attorney-General, for the State.

WEAVER, J.—The defendant was accused of breaking and entering a certain shooting gallery in the city of Shenandoah in which A. F. Carlson and S. J. Roscoe kept certain goods and wares, with intent on part of said defendant to commit larceny. On the evening of the 24th of December, 1910, Carlson and Roscoe, who were conducting the shooting gallery, locked up the building and went away, and it was not reopened until the morning of December 26, 1910, when it was discovered that a pane or sash of glass in the front door had been broken, evidently by some force applied from the outside, and a gun which had been left in the room was not to be found. The defendant being arrested upon suspicion of complicity in the act and advised to give up the gun, thereby avoiding the necessity of a search warrant, he went with the officer to the room occupied by him and produced it from its place of concealment among articles of clothing. He does not now deny stealing the gun, but denies that he broke open the building from which it was taken. His story told on the witness stand is that, passing the door in question on the evening of

December 25th, he discovered the broken pane in the door, and, yielding to the temptation thus suggested, he entered and procured the gun without having in any manner been connected with the breaking of the building. In its charge to the jury the court gave the defendant the benefit of this theory of his defense and instructed that actual breaking was an essential element of the offense for which defendant was indicted, and that if he entered the building through an opening which he found already made he was not guilty of burglary. The jury were further instructed that defendant was in the first instance presumed to be innocent, and that he should not be found guilty until each and every element of the offense was found to be established by the evidence beyond a reasonable doubt. It is very manifest from this statement that the verdict of guilty can not be successfully assailed as being without sufficient support in the evidence, and, if a new trial is to be ordered, it must be upon some ruling or instruction involving error to the defendant's prejudice. The principal errors assigned by counsel are as follows:

I. It is said the court improperly admitted evidence of confessions of the defendant made, under duress, to the officers who arrested him. The fact seems to be that on making the arrest the officer told defendant the state had quite positive proof of his guilt, and that if he would give up the gun it would save the necessity of locking him up while a search warrant could be procured for its discovery. Without any apparent protest by him, and without offer of immunity or clemency by others, he proceeded with the officer to his room and delivered up the gun. This falls materially short of a confession obtained by duress or by promise or hope of immunity or reward. In the first place, it was not a confession at all of the crime for which he was indicted—burglary. It is true that the possession of the gun so soon after it was stolen was evidence strongly

1. CRIMINAL LAW:  
burglary: confession: evidence.

tending to show his guilt of the theft; but for that offense he was not being tried. It is also true that, if the jury found and believed that the building was wrongfully broken open by someone, and that by means of the opening so made some person at or about the same time entered the building and stole the gun, proof that defendant committed the theft would justify the inference that he did the breaking and that it was done with the intent to commit such larceny; but the admission of a fact which may be competent evidence in establishing the defendant's guilt is by no means equivalent to a confession of the crime charged. *State v. Moran*, 131 Iowa, 648. Without dwelling upon the proposition, it is enough for the purposes of the present case to say the record negatives any suggestion that defendant's statements or admissions, whatever their character, were obtained by threats or promises on part of the officers having him in charge. He makes no such claim himself when testifying as a witness. He admitted the theft of the gun before the committing magistrate, and, while he evidently hoped thereby to induce leniency in the prosecution, there is an utter absence of proof of any promise made to him to influence such disclosure. So far as appears, he has at all times denied the breaking.

II. The officer making the arrest was permitted to testify that defendant said to him: "I am up against it. If you ease up on me, when I get out I am next to a whole lot in Shenandoah and can be of a lot of benefit to you." This expression was said to have been used with reference to some other public offense in that city. The admission of this evidence is objected to on the ground that it tended to connect the defendant with some other crime than the one for which he was being tried and thereby prejudiced him in the minds of the jury. Such was by no means the necessary meaning of the testimony. Defendant might well be able to give valuable assistance to the officer in ferreting out another

2. SAME: evidence.

offense without being himself in any wise implicated therein. It would be unreasonable to presume that defendant suffered material prejudice on this account.

III. On cross-examination of the officer making the arrest he was asked: "Did the boy make some of these statements because he was afraid or scared apparently?"

3. SAME: conduct of accused: cross-examination of accused.

Also: "Did not he appear to be trying to shield himself and try to throw himself on you fellows' mercy and Judge Castle at that time?" And the answer was excluded on the state's objection. This ruling is also complained of. It was clearly correct. If for no other reason, the inquiry was inadmissible because it does not direct the witness' attention to any particular statement. The young man himself made no claim that he was in any way influenced by fear, and the mere fact that he was trying to shield himself or throw himself on the mercy of the state would not affect the admissibility of his statements.

IV. In charging the jury upon the subject of the alleged breaking of the building, the court, among other things, used the following language: "In determining this

4. SAME: instruction: infringing on province of jury.

question you should take into consideration not only the direct testimony of the defendant, but also what the testimony shows with reference to how the opening in question was made and where the glass was found which came from it. As the glass of the door in the building in question was broken, it must have had a cause which either arose from some action of the elements or the action of some person, and, if you are satisfied that it was broken by some person, then you should also consider whether it is reasonable that such person would break an opening large enough to admit his body without obstruction unless he intended to enter the building thereby." To this instruction the appellant takes exception. In view of the entire record, we are not prepared to say that this statement could have prejudiced the

defense; but it is proper to suggest that the language quoted can not be approved. It partakes too much of argument and presses too close upon the domain of the jury in its mention of inferences to be drawn from given facts, a method of instruction which should be avoided. As already intimated, however, we do not regard the error as one calling for a reversal. The case as a whole was tried with marked fairness, and the verdict is so well supported by the evidence we are not disposed on this ground alone to disturb the judgment below.

Error is also assigned upon instructions given concerning the effect of testimony impeaching the general moral character of witnesses and upon defendant's explanation of the means of his entrance of the building.

The law as laid down in these instructions is in substantial harmony with those ordinarily given, in such cases, and as they have frequently been approved, we need not extend this opinion for their discussion. We have examined the record with reference to all the exceptions taken by the defendant and find no cause for ordering a new trial.

The judgment of the district court is *affirmed*.

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NELLIE FLEMING, Appellee, v. CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, Appellant.

**Negligence:** PROXIMATE CAUSE: EVIDENCE. In this action for damages on the ground of injury to the health of plaintiff's intestate, who was afflicted with tuberculosis, the evidence is held insufficient to show that flooding of the premises as claimed aggravated the disease and caused decedent increased pain and suffering.

*Appeal from Cass District Court.*—HON. A. B. THORNELL, Judge.

MONDAY, DECEMBER 18, 1911.

ACTION for damages for negligence in obstructing a stream whereby certain premises were flooded with water, and whereby sickness resulted to plaintiff's assignor, culminating in her death a few months later. There was a verdict and judgment for the plaintiff. Defendant appeals.—*Reversed.*

*Carroll Wright, J. L. Parrish and J. B. Rockafellow,*  
for appellant.

*H. M. Boorman,* for appellee.

EVANS, J.—Bull Creek is a small stream running through a part of the city of Atlantic. It is crossed by the track of the defendant railway company. The creek is covered by a culvert constructed by the defendant in 1902. There was evidence tending to show that the opening in the culvert was not large enough to carry the stream in times of high water. In the fall of 1905 the plaintiff lived in a rented home near the bank of the stream, and within three hundred feet of the culvert. On the 17th of October, 1905, her premises were flooded as a result of very heavy rains. On the next day her daughter, who was living with her, had a severe cold and cough. She died on March 12th following. This action was commenced by the daughter during her lifetime. She later assigned her cause of action to her mother, who was duly substituted as plaintiff. The trial court held that there was no evidence to justify a finding that the flooding of the premises caused the disease from which plaintiff's assignor died. This disease was known as 'consumption' or 'tuberculosis.' The evidence is quite conclusive that the plaintiff's daughter was afflicted with this disease for some months, at least, prior to October 17th. In a sworn petition filed by the plaintiff herself in another case on September 26th, she averred that her daughter was "in

the last stages of consumption." The trial court, however, submitted to the jury the question whether the daughter's disease was aggravated through the negligence of the defendant, and whether she incurred additional pain and suffering by reason thereof.

The first question for our consideration is whether there is sufficient evidence in the record to sustain the jury's affirmative finding on this question. That is to say, whether there is any evidence to show that defendant's alleged negligence was the proximate cause of additional pain and suffering on the part of the plaintiff's daughter. The plaintiff's evidence was sufficient to show that the daughter was sicker subsequent to the date of the flood than she had been before. For the purpose of proving that this condition was caused by the flooding of the premises, the plaintiff introduced in evidence the testimony of her physician, as follows: "Q. Assuming, doctor, that on the 17th day of October of that year that the home of Miss Fleming was overflowed by water from Bull Creek, which was cold, the water was perhaps a foot deep upon the premises, filled the cellar with water, that she was then in the home, that the day before the flood she had no cold, what might have produced her cold from which you found her suffering on the 21st? (That is objected to because it is involved or assuming a state of facts not proven, and because it is incompetent and invading the province of the jury and speculative. Overruled. Defendant excepts.) A. It might have been caused by the flood. Q. I will ask you to state what might have been the probable effect of such overflowing of the premises and the filling of the cellar with cold water on the 17th day of October to Miss Fleming, assuming that she was living in the house at that time? (Objected to because it involves a state of facts not proven and invades the province of the jury, and is speculative. Overruled. Defendant excepts.) A. The effect might be to produce a cold." He testified, also, that the patient had a

cold and a cough on October 21st; that he treated her professionally until she died; that her condition at the time of her death was one of "progressing stage of tuberculosis," involving both lungs and bowels. Thereupon the following question was put to the witness: "Q. Knowing what you do about her case, or knowing what you do about her case, Doctor, what would you say might have been her condition October 21, 1905, might have been a month after that time, had her environment not been subject to the flooding of her home and premises? (Objected to as invading the province of the jury and speculative. Overruled. Defendant excepts.) A. It might have been similar to her condition before this flood."

The foregoing is the only evidence in the record in support of the proposition that the flooding of the premises was a proximate cause of the aggravation of the disease and of an increase of pain and suffering to the patient. The physician testified upon cross-examination: "Progressive tuberculosis is usually accompanied with a cough, and ordinarily it becomes worse as the disease progresses to the final termination, although that is not true in all cases. In some cases they suffer pain as the disease progresses, which might be connected with a cough. Tuberculosis is a germ disease." We think the evidence here considered was too uncertain and speculative to support a finding that the defendant's negligence caused increased suffering to the patient by the aggravation of the disease. Appellee cites authorities to the proposition that such evidence was admissible, but this does not quite reach the question. Granting that it was admissible, it does not follow that it was sufficient of itself as proof of proximate cause. Cases involving personal injury present a somewhat different question. In such cases the nature of the injury often affords proof of some independent cause. In the case under consideration, we can not say that there is any evidence sufficient to show that the patient's condition sub-

sequent to October 17th was not the result of the ordinary progress of her disease. We must hold, therefore, that the evidence is insufficient to support a finding that the defendant's negligence was a proximate cause of any increased pain and suffering or medical expense to the patient. A new trial ought to have been granted on this ground. See *Trapnell v. City of Red Oak*, 76 Iowa, 744.

The judgment below must therefore be *reversed*.

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L. F. MOSTELLER V. IOWA CENTRAL RAILWAY COMPANY,  
Appellant.

**Carriers:** INJURY TO LIVESTOCK: NEGLIGENCE: BURDEN OF PROOF. Where a shipper receives live stock for transportation then in good condition, and is charged with the exclusive care and control of the same, proof of its bad condition at the point of destination raises a presumption of negligence in its transportation, which the carrier must overcome to avoid liability therefor. But where the shipper or his agent accompanies the stock, and in consideration for his transportation undertakes to load, unload, feed and care for the same, he must not only show its damaged condition at the point of destination, but also that the injury was not the result of his negligence, but that of the carrier. Where, however, the shipper shows that the injury was not the result of his negligence, delivery of the stock in a damaged condition at the point of destination raises the presumption of negligence on the part of the carrier; but the burden continues upon the shipper throughout to establish the negligence of the carrier.

*Appeal from Hancock District Court.*—HON. C. H. KELLY,  
Judge.

MONDAY, DECEMBER 18, 1911.

ACTION for damages to horses shipped over the defendant's line of railway resulted in judgment as prayed. The defendant appeals.—*Reversed*.

*Geo. W. Seevers, W. H. Bremner and J. E. Wichman,*  
for appellant.

*C. R. Wood and Senneff & Bliss,* for appellee.

LADD, J.—The plaintiff loaded a car with household goods, machinery, a coop of chickens, and eight horses at Hoopeston, Ill., and billed them over the Lake Erie & Western Railroad Company's line to Peoria, Ill., and from there to Corwith, Iowa, over the defendant's line. The horses are alleged in the petition to have been injured to the extent of from \$50 to \$150 each by delays in the course of transportation over defendant's road, hard handling of the car, refusal to unload, or to afford facilities to feed and water. Chauncy Moore accompanied the stock by virtue of the shipping contract, which provided: That the said shipper is at his own sole risk and expense to load and take care of and to feed and water said stock whilst being transported, whether delayed in transit or otherwise, and to unload the same; and neither said carrier nor any connecting carrier is to be under any liability or duty with reference thereto, except in the actual transportation of the same.

The evidence in plaintiff's behalf tended to show that the horses were damaged by the rough handling of the car, failure to properly care for them en route in the matter of feeding and watering and unloading, and that this was due to the refusal of the defendant's employees to furnish proper facilities and opportunity to feed, water, and unload; and there was evidence in behalf of defendant to the contrary. The only exceptions argued are to three of the instructions. Those to the fifth and tenth of these, with respect to limiting the amount of recovery for injury to each horse to that claimed, will be obviated on another trial, which the exception to the ninth instruction will render necessary. Therein the court directed the jury

that: "If you find, from the weight or preponderance of the evidence introduced upon the trial that, at the time said horses were delivered to the Iowa Central Railway Company at Peoria, Ill., said horses were in good condition, and you further find, from the weight or preponderance of the evidence introduced upon the trial, at the time they reached Corwith, Iowa, they were in a damaged condition, then it is incumbent upon the defendant to prove that such damaged condition was not in fact caused by the defendant."

The evidence was conclusive that the horses were in a damaged condition when delivered at Corwith, and the jury was told in the eighth instruction that, in order to recover, it must appear that this was not the result of any negligence on the part of those accompanying the stock. There was no instruction to the effect that the burden of proof was on plaintiff to show that injuries due to any omission in the matter of feeding or watering, loading or unloading, were because of negligence of defendant, and the purport of the instruction quoted, in the light of the evidence, was directly to the contrary. But for the circumstance that Moore and Blakely accompanied the car, the instruction quoted, in so far as it indicated that from delivery by the shipper in good condition and delivery by the carrier at the destination in bad condition negligence of the latter was to be inferred, and, unless met, would justify recovery by the shipper, finds support in *Swiney v. Express Co.*, 144 Iowa, 342.

This is on the theory that, as the stock, having been delivered in good condition, is presumed so to continue until the contrary appears, *Powers v. Railway*, 130 Iowa, 615, if in bad condition upon reaching its destination, this, as it has been in the exclusive control of the carrier, is presumed to have resulted from some negligence on its part. In other words, from a showing of having been delivered to the carrier in good condition and received by

the shipper at its destination in bad condition, the inference arises that the company has been negligent in the performance of its duties as a common carrier in the transportation of the stock.

But where the owner, or someone acting for him, accompanies the stock, and, in consideration of being carried, undertakes to load, unload, feed, and water the stock, such an inference is not tenable, for the injury as well may have resulted from the carelessness of the owner or his agent, as from the negligence of the carrier's employees. For this reason, the courts quite generally require that the shipper who accompanies his live stock himself, or has his employees do so, prove affirmatively that injury thereto during transportation was not consequent of anything the shipper or his agent undertook to do or did in the care of his stock, and, if injured in any such respect, that this was owing to some fault of the carrier in neglecting to afford facilities for such care. Thus, in *Grieve v. Railway*, 104 Iowa, 659, the owner accompanied his stock, and it was said:

As a general rule, injury to property transported being shown, the burden is cast upon the carrier to exculpate itself from blame. This is because of its exclusive control of the property, and of the instrumentalities of transportation, and of its superior means of information. But is this true where the shipper assumes to and actually does take charge of his stock during its transportation? In such a case, the animals are not in the exclusive custody of the carrier, nor are its means of information superior to those of the shipper, who is in a position to know what has been done or omitted, as well, if not better, than the carrier. Now, the cattle were kept in the cars, without unloading, or feeding, or watering, in Chicago, for about nine hours, and the injury, if any, was occasioned thereby. All this, however, the plaintiff had assumed to do, and, if his failure therein was caused by any act of the defendant, he knew what it was as well as the company. If he demanded facilities for unloading the cattle, or for feeding

and watering them, and these were not provided, or were refused, then the burden was cast upon the defendant to excuse itself for not furnishing them. But the burden is certainly on the shipper in the first instance, to show that the injury did not result from his own negligence, and if occasioned by failure to do what he has undertaken, then that such failure resulted from an omission on the part of the company to perform some duty devolving upon it.

In that case the complaint was that the cattle and hogs had been confined in the car without proper attention longer than they should have been, and, as the shipper had undertaken to unload, feed, and water them, and had accompanied the stock for that purpose, the inquiry related to the very things he was to do. The natural inference then was that the injury was due to his own fault, and not that of the company. If he was prevented from bestowing the care he had undertaken to give them by some agency over which he had no control, he was aware of that quite as well, if not better, than the company's employees. To cast on him the burden of proving the negligence of the carrier, then, in the matters the shipper had assumed and was there to do, as in failing or refusing, on request or information of the need, to afford facilities for loading, or unloading, feeding, or watering, was but the reasonable and logical course to pursue, and this involved, not only a showing of the shipper's want of negligence, but of the carrier's negligence.

In *Burgher v. Railway*, 105 Iowa, 335, the action was for damages resulting from the failure of the person accompanying the stock to do what, by the terms of the shipping contract, he had undertaken, and, as these were not due to any fault of the carrier, the court held that the railroad company was not liable for resulting damages.

In *McManus v. Railway*, 138 Iowa, 150, though the shipper accompanied the stock, the trial court charged, as in the case at bar that the burden of proof was upon de-

fendant to show that it was not liable for damages thereto. Though the loss or injuries complained of were not all such as pertained to the matters the shipper had undertaken, it was said the burden of proof was upon plaintiff, and recovery was denied, for that damages were not affirmatively proven.

In *Colsch v. Railway*, 149 Iowa, 176, the *McManus* case, in extending the doctrine of the *Grieve* case so as to cast on the shipper who accompanies his live stock in transportation the burden of proving the negligence of the carrier, even though this may have been in no way connected with what the shipper had done or undertaken to do, was followed, and opinions so deciding quoted with approval. That action, as this, was to recover damages consequent of the carrier's negligence, and logically, as is pointed out in 4 Elliott on Railroads, section 1548-a, there is much reason for the conclusion of many courts in holding the burden to be on plaintiff to prove the allegations of negligence contained in his petition. This requires no more to make out a *prima facie* case than the inference to be drawn from a showing that the live stock was in good condition when delivered to the carrier, and was in bad condition, not evidently due to natural propensities or ordinary climatic conditions, upon arrival at its destination. And the shipper who accompanies his stock may, in order to make out a case, be compelled to resort to a showing of this kind. Ordinarily, in accompanying it, he will be quite as well aware of the way it is handled in the operation of the train, in switching, and the like, as the employees of the company; but he is not required at his peril to stand guard over the employees of the carrier that, in event of injury, he may be able to establish their carelessness by his own testimony, but may assume that they will observe their legal obligation by bestowing on the property proper care, and, if they fail so to do, rely on circumstantial evidence, as that the stock suffered injury

in the meantime, not necessarily attributable to their natural propensities or climatic conditions. His cattle or other live stock, being in good condition when last seen by him, are presumed to so continue with proper handling, until the contrary is shown; and if it is made to appear on the trial that the shipper, in accompanying the stock, has done what he undertook, and that the stock was not injured in connection with anything he was to do or did, and yet were in bad condition upon reaching its destination, the inference arises that this was the result of negligence on the part of the carrier. In other words, the carrier, in such a case, is not relieved from meeting the inference that the injury was the result of some neglect on its part precisely as though the shipper had not accompanied the stock. The shipper undertakes to see to his stock only in a limited way. The carrier continues in control of all the instrumentalities of transportation. With these it is familiar, and there is precisely the same reason for inferring its negligence in transporting the live stock upon a showing that the same, though injured in transit, was not injured in connection with what the shipper undertook to do or did, as though he had not accompanied the stock at all. But the mere fact that the circumstances shown by the shipper, as plaintiff, are such as to make out a *prima facie* case which, unless met by evidence on the part of the carrier, as defendant, will warrant a finding that the latter has been negligent, in consequence of which the former has suffered damages, will not shift the burden of proof. Such burden, as was held in the *Colsch* case, continues on plaintiff, who bases his claim for damages on the alleged negligence of the carrier in transporting his live stock, precisely as in other actions sounding in tort.

Because of the error in the instructions, the judgment is reversed.

## LEWIS D. ALBRIGHT V. TABITHA D. ALBRIGHT.

**Gifts:** EVIDENCE: ADMISSIONS OF A DECEDENT. The verbal statements  
1 or admissions of a deceased person are not alone ordinarily sufficient to establish a gift, but are admissible in evidence; and if other facts and circumstances are shown which fairly tend to show the alleged gift such admissions are often of much value in determining the controversy. In this action the evidence as a whole is held sufficient to establish a gift of real property by decedent to plaintiff.

**Same:** SELF-SERVING DECLARATIONS. The admissions of a donor or  
2 grantor which are against his own interest or title, are ordinarily admissible against his devisees or heirs, but his declarations at another time and in his own interest are not competent evidence.

**Parol gift of land:** POSSESSION AND IMPROVEMENT: EVIDENCE: STATUTE  
3 OF FRAUDS. In this action to establish a parol gift of land it was shown that the donee went into possession a number of years prior to the death of the donor and remained in possession until after his death without rent, making various improvements, consisting of clearing the land of stumps and trees, the erection of new buildings and repair of old ones, in the aggregate amounting in value to several hundred dollars, and all of a permanent character. *Held*, there was a sufficient showing of permanent improvement to satisfy the statute of frauds and to support a finding of a gift rather than a mere intent to make a gift in the future.

**Same:** ACQUIESCENCE: ADVERSE POSSESSION: ESTOPPEL. Where the  
4 plaintiff, as in this case, entered into possession of real estate under an alleged oral gift and for many years occupied, managed and controlled it as his own without objection or protest from the donor, who had full knowledge of the plaintiff's acts of dominion over the property, the donor's widow was estopped to claim title adverse to plaintiff.

**Wills:** ELECTION BY WIDOW: NOTICE. A widow is not required to  
5 make her election to take dower rather than accept the provisions of the will for her benefit, until notice has been served requiring her to elect as provided by the statute.

*Appeal from Clinton District Court.*—HON. A. P. BARKER,  
Judge.

MONDAY, DECEMBER 18, 1911.

ACTION in equity to quiet title to real estate. There was a decree for the plaintiff, and defendant appeals.—*Affirmed.*

*Skinner & Coe*, for appellant.

*Wolfe & Wolfe*, for appellee.

WEAVER, J.—It is conceded that A. J. Albright, now deceased, was at one time the owner of the land in controversy. The plaintiff claims the property under an alleged gift from the deceased and by adverse possession. The defendant, the widow of A. J. Albright, asserts title to the same tract under the will of her said husband, which has been duly probated. The trial court, after hearing the testimony, found that the gift was made to plaintiff as alleged, and that he took and held possession thereunder, but that he had not sufficiently shown any permanent improvements made on the land in reliance upon such gift. The court further held and found that while the gift did not, for the reason mentioned, become consummate as such, plaintiff's possession and claim of right thereunder for more than ten years was sufficient to perfect the title in him by adverse possession. A decree was therefore entered quieting title in plaintiff, except as against the defendant's claim of dower to which the court held it was subject. Both parties appeal; but, the defendant's appeal being first perfected, she alone will be spoken of in this opinion as appellant.

The case as made by the plaintiff tends to show that A. J. Albright was in his lifetime a man of considerable

wealth, and died possessed of a large estate. He had no children, but plaintiff in this case was a nephew, whom, when a small boy, he took into his family, giving him nurture, care, support, and education such as a parent ordinarily provides for a child. Plaintiff remained a member of the family until he arrived at his majority in the year 1896, when he married and went into possession of the "Mill Farm," which is the name by which the witnesses designate the tract now in dispute. This possession he claims to have taken pursuant to a gift of the land from his uncle, and to have maintained the same adversely till the death of the latter some fourteen years thereafter. To corroborate and sustain this claim, a large amount of testimony was introduced concerning statements made by A. J. Albright respecting the alleged gift, his conduct with reference to the land, and plaintiff's possession thereof. It is too voluminous to justify its incorporation *in extenso* in this opinion, but may be briefly stated as follows:

1. GIFTS: evidence: admissions of a decedent.

One witness informed said Albright of his desire to purchase a farm, and the latter advised him to buy "that place of Lewie's," referring to the land in question, and, when the witness said he did not have sufficient means to make the purchase, Albright suggested that he himself would advance him the amount necessary for that purpose. Another witness had negotiation with plaintiff looking to an exchange of the Mill farm for town property, pending which witness asked A. J. Albright concerning the matter, and was told by him that, if he (Albright) was to do the trading, he would not make the exchange, but "it would be up to Lewis, that he had given him the farm, and whatever he would do was all right." The same witness says Albright often referred to the matter, saying: "He had given the farm to Lewis." To another witness who had formerly talked of buying the farm he said: "You made a mistake that you did not buy it that time. Now, I have given

it to Lewis." To another who approached him on the subject of renting the land he said: "The rent belongs to Lewis." To another he proposed to sell the Mill farm, saying: "It isn't mine. It is Lewis', but I have a letter from him to sell it and send him the money." He made a similar statement and proposition on different occasions to two other witnesses. To a relative of the family he said he had given away a part of his estate, and given the Mill farm to Lewis. Later, and within a year or two of his death, he said to the same witness he had given the Mill farm to Lewis a long time ago. The statements of some of these witnesses were varied somewhat on cross-examination, but were not, we think, materially weakened. The plaintiff himself testifies to the gift and the circumstances of the transaction, but his competency as a witness is challenged, and we must consider his claim in the light of facts otherwise made of record. Evidence of verbal statements and admissions of the deceased are of themselves alone ordinarily insufficient to establish a valid gift, but they are admissible in testimony, and, if other facts and circumstances are adduced which fairly tend to show the alleged gift, such admissions may be of much value in arriving at the truth of the controversy.

Of the additional circumstances relied upon by the plaintiff we refer to the following: He arrived at his majority and married in the year 1896, the date of the alleged gift. Two or three months after that date, he moved upon and took possession of the Mill farm, and personally occupied the same for four years. He paid no rent to his uncle. His possession, use, and enjoyment of the premises and of the produce thereof was exclusive. He made various improvements on the premises in the building of hog-houses and corn-cribs and renovation of old buildings and the grubbing of trees to an aggregate amount estimated by him of about \$600. At the end of the fourth year he leased the land in writing, and in his own name as lessor,

for a term of ten years, and went with his wife to the western part of the state. To secure payment of the rent, he took from the tenant twenty promissory notes of \$425 each, payable at intervals of six months, and placed them for collection and safe-keeping in the bank of which A. J. Albright was president, and took the bank's receipt therefor. This rent when collected by the bank was credited to the plaintiff, and, after charging him with expenditures for taxes, repairs, and collection fees, the remainder was forwarded to him. The buildings were insured, the policies being taken in the name of A. J. Albright, but the bills therefor were sent to the plaintiff, and he paid them. While plaintiff was in the West, more or less correspondence by letter took place between him and A. J. Albright, but, so far as it has been put in evidence, the matter of the ownership of the Mill farm was never mentioned by either party. The ten-year lease expired about the time of the death of A. J. Albright, and thereafter dispute arose between the parties hereto with respect to the title, settlement of which is the object of this proceeding.

The theory of the defendant is that A. J. Albright gave the plaintiff no more than the income from the Mill farm, and did not attempt or undertake or promise to part with the title. In support of this defense, the defendant herself testifies that soon after Lewis married she heard A. J. Albright tell him "he could go down on the Mill farm, and could have what he made off of it," and that within a month or two thereafter Lewis went into possession of the farm. She further says that her husband and herself at one time "talked of giving the farm to Lewis, and fixing it so Lewis and his wife could not handle it, but we never done it." No conveyance was in fact made. In the year 1907, while plaintiff was in the West, deceased advertised an auction sale of certain property, including the Mill farm, but the auctioneer named in the

advertisement testifies upon the trial that deceased told him at the time that the farm belonged to Lewis. No bids being offered in advance of the reserved bid of deceased, the land was not sold. The land was taxed and the buildings insured in the name of A. J. Albright, but, as we have seen, the expenditures were, in part at least, charged back to Lewis. Defendant offered other evidence tending to show that, after plaintiff moved away leaving the farm in the hands of tenants, the deceased directed or authorized the digging of a well and cistern, and the making of certain repairs. These bills the records tend to show were in whole or in part charged up to the plaintiff, and deducted from the rent collected. One witness bought from deceased trees growing on the farm to the amount of \$45. To another he offered to sell the farm. To another he made a similar offer, and offered to let the witness have the money with which to buy it. In the presence of another, a member of the family, he said he did not intend to let Lewis have the rent any more after the lease to Brown expired. To another he said that: "Whatever Lewis does on the farm will be to his own interest, because the chances are he will own it some day." The cashier of the bank says that on many occasions the deceased in his presence spoke of the farm, denied the authority of Lewis to rent it, and was dissatisfied with his management generally. There is no evidence that any of these statements were made to or in the presence of plaintiff. It is also shown that while plaintiff was in the West he negotiated a deal for the sale or exchange of other land owned by A. J. Albright upon terms which involved him in some debt to the latter, and in writing about it he reassured his uncle of his ability to pay the debt by mention of the property owned by him in Western Iowa, and South Dakota, but made no mention of the Mill farm.

Most of the testimony which we have referred to on both sides was introduced over objections to its competency

and materiality. After a careful reading of the entire record, it must be said that, assuming the truth of the evidence offered by the plaintiff, the theory of a gift as claimed by him has very strong support, while there is very little of the evidence on behalf of the defense which is not reconcilable with that view of the case. The statement of A. J. Albright to plaintiff that he could go upon the farm, and have what he could make off of it, was made in January, 1896. Plaintiff did not go upon the farm until March of that year, and there is no necessary connection between these facts. There is no testimony that Lewis assented to the offer at the time it was made, or expressed any purpose to take possession under it. The defendant says she never heard deceased mention the subject again, though he did afterward consult with her about giving the land to Lewis, and fixing it so Lewis and his wife could not handle it. His offers to sell the land are entirely consistent with the testimony of plaintiff's witnesses that he said he was trying to sell it for Lewis. His interest in looking after the land in the absence of Lewis may well be regarded as the natural solicitude of one standing in the place of foster parent to the plaintiff, and the deduction of the expense so incurred from the rents collected for Lewis is quite inexplicable, save on the theory that he was dealing with plaintiff's land, and not his own. The record reveals not a word of objection from A. J. Albright to plaintiff or in his presence concerning the latter's notorious exercise of dominion and acts of ownership over this land for a period of fourteen years. The only showing of any statement on his part inconsistent with the theory of gift is found in alleged conversations with third parties after the date of the alleged gift, and after plaintiff had assumed possession and control of the property.

The incompetency of such evidence is apparent. While the declarations of a grantor or donor against his

own interest or title are ordinarily admissible in evidence against his heirs and devisees, his declarations at another time in his own favor are incompetent. *Lewis v. Adams*, 61 Ga. 559; *Fellows v. Smith*, 130 Mass. 378; *Julian v. Reynolds*, 8 Ala. 680; *Newman v. Wilbourne*, 1 Hill Eq. (S. C.) 10; *Matteson v. Hartmann*, 91 Wis. 485 (65 N. W. 58); *Van Fleet v. Van Fleet*, 50 Mich. 1 (14 N. W. 671); *Robbins v. Spencer*, 140 Ind. 483 (38 N. E. 522, 40 N. E. 263); *Harness v. Harness*, 49 Ind. 384; *Thistlewaite v. Thistlewaite*, 132 Ind. 355 (31 N. E. 946); *Davis v. Melson*, 66 Iowa, 715; *Ellis v. Newell*, 120 Iowa, 71; *Royal v. Chandler*, 79 Me. 265 (9 Atl. 615, 1 Am. St. Rep. 305); *Greenleaf's Evidence*, section 189; *Padgett v. Lawrence*, 10 Paige (N. Y.) 170 (40 Am. Dec. 232); 2 *Wigmore's Evidence*, section 1080; 1 *Elliott's Evidence*, sections 267-269. The case has many points of similarity with the one treated by us in *Bevington v. Bevington*, 133 Iowa, 351, where we held the gift to have been sufficiently established.

It is said, however, that the plaintiff in this case has made no sufficient showing of improvements on the land in reliance upon the gift to him. It is true that the improvements shown are not as valuable as were those in the *Bevington* case, but they were such as perhaps the majority of young farmers just beginning life would be likely to make, small structures suited to his present needs and to the convenient use of the land. "Permanent improvements" are not necessarily everlasting in character, but are such as rest upon, or are attached to, the soil, are reasonably enduring, and not intended for removal at the end of a limited term. Other beneficial changes in the premises, like the moving of buildings, the construction of roads or grubbing of stumps and trees, may be treated as permanent improvements. It is insisted in argument that because the improvements claimed to have been made by

2. SAME: self-serving declarations.

3. PAROL GIFT OF LAND: possession and improvement: evidence: statute of frauds.

plaintiff do not aggregate a large sum, and would be more than equaled by the rent of the land, it should not be considered in support of the alleged gift. But we are not aware that the amount of improvements made by a donee of land is a controlling factor in such cases.

If it is enough to show good faith on his part and render it inequitable in the donor to repudiate the gift, the law is satisfied, and the donee's title will be sustained. It is no answer to compare the amount of improvements with the rents and profits derived from the land. If there was a gift, it carried with it the rents and profits, and money so derived belonged to the plaintiff as completely as if it had been earned or received by him from a wholly independent source. It is the theory of the defendant herself that there was a gift to the plaintiff of the use of the land. The improvements are not to be considered as in any sense or degree affording a consideration for the gift. A gift is a gratuity, and *ex vi termini* negatives the idea of consideration passing from the donee to the donor, and, if the donee signifies his acceptance by taking possession of the premises, and upon faith of the gift expends time, labor or money in improvements, which the donor can not in equity and good conscience be permitted to ignore, the transaction is irrevocable.

It is further argued that, at best, the plaintiff's evidence shows an intent on part of the deceased to make a gift of the land in the future. Some of the testimony on both sides is capable of that construction, but a declaration at one time of an intent to give and at another of a gift in fact are not necessarily inconsistent. Again, so long as no deed of conveyance was made or delivered, the gift could do no more than vest the plaintiff with the equitable ownership, and declarations of intent thereafter made by the deceased may reasonably have had reference to his purpose to perfect the legal title in plaintiff by proper conveyance. Speaking to the same point in the *Bevington*

case, we said: "That proposition may be true as to some of the witnesses; but, while the statements repeated by them do tend to show a mere intention, they are followed and supported by others clearly tending to show a gift actually made, and altogether make up a formidable case." In the same connection we may also here repeat what we there said as to the *quantum* of proof required to establish such a gift: "Undoubtedly it will be upheld only on a clear and unequivocal showing. This does not mean that the proof in support of the gift must be undisputed. Such a rule would mean in practical operation that no contested claim of gift could ever be established. The law requires no more than that the result shall not be reached by a mere balancing of doubts or probabilities but by clear and unequivocal proof of facts upon which the court or jury may reach a reasonably satisfactory conclusion. In other words, the rule does not require absolute certainty, but reasonable certainty, of the truth of the ultimate fact in controversy."

Observing that rule, we are led to the conclusion that plaintiff's claim of gift is sufficiently established. Moreover, as pointed out by the trial court, plaintiff's possession was assumed fourteen years before the death of A. J. Albright. While he does not claim to have received a conveyance of the legal title, his conduct has been that of one in possession under a claim of right to the title. His attitude has not been that of a mere tenant at will or at sufferance.

As we have already noted, it is very significant that during this entire period of fourteen years there is no evidence tending to show that A. J. Albright ever in person, or by letter or by agent, addressed a word of objection or protest to the plaintiff against his assumption of dominion over the land, a thing which could hardly be possible if as defendant's principal witness seems to intimate deceased

4. SAME: acquiescence: adverse possession: estoppel.

resented such conduct, and denied to the witness (not to plaintiff) the authority of the latter to lease or otherwise use the land as his own. Under such circumstances, we think it is now too late for the appellant to set up claim to title adverse to the plaintiff. That A. J. Albright intended to give the land to the plaintiff is shown beyond room for reasonable doubt. That he made that intent effective by a gift in fact is shown by a satisfactory preponderance of the evidence; and this conclusion is confirmed by the conduct of the parties and the possession of the land by plaintiff, claiming and exercising dominion over it for a period more than equal to that fixed by the statute of limitations.

We can not attempt to discuss all the points made by counsel within the permissible limits of his opinion. They are as a rule governed by the conclusions we have already announced, and we find therein no sufficient reason for interfering with the finding of the trial court on this branch of the case.

The question raised by the plaintiff's appeal is not wholly free from doubt, but we incline to the view that, under the record as here presented, the decree below awarding dower in the land to the defendant must be upheld. It is to be admitted that under the statute (Code, section 3270) the provision made for her in the will is presumed to have been intended in lieu of dower, but she can not lawfully be denied her right to elect between the devise and her statutory share (Code, section 3376), and she is not put to her election until notice so to do is given her (Code, section 3377). No such notice is shown. Whether demanding and taking dower in this case will operate as an election is a question not here presented. It is sufficient that no prior election having been shown, and it being conceded that her husband was seised of the land during the existence of their marriage relation, and that she has never

5. WILLS: election by widow: notice.

relinquished her dower right, it follows of necessity that her demand for its enforcement must be respected.

If, as plaintiff argues, the dower should be taken from other lands of which A. J. Albright died seised, the burden of showing the existence of such lands and their value would seem to be on the plaintiff. There is no allegation or sufficient proof on that subject.

The decree will therefore be affirmed upon both appeals. A motion to strike appellant's amended abstract has been submitted with the case. The amendment has been useful in making clearer some matters of evidence, and we are disposed to hold it was properly filed. The motion is denied.—*Affirmed.*

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IRA INGRAHAM V. MERCHANTS NATIONAL BANK OF GREENE,  
IOWA.

**Courts:** JURISDICTION: USURY: FEDERAL STATUTE: CONSTITUTIONAL LAW. A state court having jurisdiction of questions involving usury has jurisdiction, under the federal statute, of actions to recover from a national bank the penalty for taking usury as provided in that statute. And the fact that the statute does not provide for recovering a like penalty from state banks does not render it obnoxious to the constitutional provision that all laws of a general nature shall have a uniform operation.

*Appeal from Butler District Court.*—HON. J. F. CLYDE,  
Judge.

WEDNESDAY, OCTOBER 25, 1911.

Suit in equity to recover usurious interest under the provisions of sections 5197 and 5198 of the Revised Statutes of the United States (U. S. Comp. St. 1901, page 3493). There was a judgment for the plaintiff, from which the defendant appeals.—*Affirmed.*

*C. M. Greene and Dawson & Wehrmacher*, for appellant.

*M. Hartness and Chas. G. Burling*, for appellee.

SHERWIN, C. J.—This action was brought under the provisions of sections 5197 and 5198 of the Revised Statutes of the United States, which authorize any person, paying to a national bank a greater rate of interest than the law allows it to take, to recover from it, in an action in the nature of a debt, twice the amount of the interest so paid. Section 5198 also provides: "That suits, actions, and proceedings against any association under this title may be had in any circuit, district or territorial court of the United States held within the district in which such association may be established, or in any state, county or municipal court in the county or city in which said association is located having jurisdiction in similar cases."

The appellant contends that the language of section 5198 just quoted does not confer jurisdiction upon state courts, "except in so far as a state can award the private right created by said statute under a power, authority, or jurisdiction already possessed by the state courts by reason of the State's own Constitution and laws, and in accordance with its own settled public policy." National banks are creatures of the general government, and the statutes under consideration were enacted for the express purpose of limiting the amount of interest they may charge, and providing a penalty for knowingly taking more than the amount allowed by law. This penalty is certain and fixed in all cases where the power of the statutes may be rightfully invoked. It is the means designated by the creator of the banks for compelling obedience to the law. Section 5198 expressly confers jurisdiction upon all state courts which, under the state law, already have jurisdiction in similar cases. The limitation to courts having jurisdiction in similar cases does

not, in our judgment, mean that only state courts may have jurisdiction, where the state imposes the same penalty; nor does it limit the jurisdiction to cases where the penalty provided by the state law is alone involved. If the first of the suggested limitations is to control, there would be no reason for the penalty fixed in the Revised Statutes, and the same is true as to the second suggested limitation, because, if the state penalty is to control, there would be no force or vitality in the penalty imposed by the Revised Statutes. They would be meaningless and without force or reason in both cases. Hence the fact that a state law may provide a penalty for usury does not affect the status of a national bank under the federal law. What the United States statutes undoubtedly mean is that any state court that has jurisdiction of actions involving the question of usury shall have jurisdiction of actions arising under them. The appellant cites no authority which holds differently. *Hecht v. Springstead*, 51 Iowa, 502, and *Wetmore v. McMillan*, 57 Iowa, 344, did not consider the question now before us, and they are in no way controlling. On the other hand, *National Bank v. Eyre*, 52 Iowa, 114, and *Kinser v. Bank*, 58 Iowa, 728, furnish support for the conclusion we reach, as does also *Bank v. Morgan*, 132 U. S. 141, (10 Sup. Ct. 37, 33 L. Ed., 282). See, also, *Bank v. Moore*, 83 Iowa, 740, and *Bradbury v. Railway Co.*, 149 Iowa, 51.

The fact that a penalty for usury may be recovered from a national bank, but not from a state bank, does not render the law obnoxious to the constitutional requirement of this state that all laws of a general nature have uniform operation. It is sufficient answer to this suggestion to say that laws are of uniform operation, if they apply to all persons in like situation. *Land Co. v. Soper*, 39 Iowa, 112; *Iowa Med. Col. Ass'n v. Schrader*, 87 Iowa, 659.

The appellant's further contention is that the plaintiff should not, on the whole case, be allowed any recovery. We have given the entire record painstaking examination, and

reach the conclusion that the finding of the trial court on the facts is fully sustained. We, therefore, are of opinion that the judgment should be, and it is, *affirmed*.

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ALBERT SLOB, Appellee, v. GERRIT DE MOTS, SR., and J. HOEVEN, Appellants.

**Reformation of instruments:** EVIDENCE. A written contract of sale  
1 by one partner of his interest in the firm to his co-partners which names the sum to be paid him, without stating any basis of computing the same, will not be reformed as to the amount to be paid on the ground of mistake unless a clear case of mistake is made out. In this action the evidence is held sufficient to show that the sum named in the contract was the result of a mutual mistake, and was determined by computation from an erroneous invoice of the partnership property.

**Same:** PAROL EVIDENCE. The parol evidence rule does not apply to  
2 a suit in equity to reform a contract.

*Appeal from Woodbury District Court.*—HON. FRANK R. GAYNOR, Judge.

TUESDAY, NOVEMBER 21, 1911.

**ACTION** on a promissory note. An equitable defense was pleaded. The cause was tried on the equity side of the court. There was a decree for the plaintiff for the full amount of the note. Defendants appeal.—*Reversed*.

*Kass Bros.*, for appellants.

*O. T. Naglestad and Sullivan & Griffin*, for appellee.

EVANS, J.—The plaintiff brought a suit upon a note for \$1,600, dated January 16, 1909. The defendants admitted the execution of the note, but averred there was a mistake in the amount thereof. They also set up a written

contract in pursuance of which the note was given and averred a mistake therein and asked a reformation of both note and contract. Prior to January 16, 1909, the plaintiff and the defendants were partners in the implement business at Sioux City. On that date a dissolution of the partnership was effected by the plaintiff's sale of his interest therein to the defendants. The amount fixed upon as due the plaintiff was \$2,637.53. This amount was incorporated into the written contract entered into between the parties and into a bill of sale from the plaintiff to the defendants. Of the consideration so to be paid the defendants executed their note for \$1,600 and paid the balance in cash. The defendants aver that by mutual mistake the net equivalent of about \$3,500 was omitted from their computation, and that the amount thus mistakenly found due the plaintiff was about \$1,100 too large.

The parties had formed their partnership about one year prior to the date of dissolution. They had all formerly lived at Sioux Center. They organized the partnership for the purpose of becoming successors in business to one Scott. They purchased his building for \$10,000. Of this sum they paid \$4,000 in cash and gave their note for \$6,000. The agreement between the partners was that the capital should be \$9,000, of which each should contribute one-third. None of them ever did pay the full amount so agreed upon. The amount actually paid by each one was as follows: Slob, \$2,100; De Mots, \$2,635; Hoeven, \$2,700. During the course of the year they drew out funds as follows: De Mots, \$255.80; Slob, \$477.34; Hoeven, \$804.33. In the negotiations for the sale or dissolution, four days were consumed in making a complete invoice of the assets of the firm. This was done principally by Slob and Hoeven. As a result of such invoice, a certain statement of items and figures was made out by Slob and Hoeven, and which is known in this record as "Exhibit 6," and is as follows:

## Trial Balance.

	Dr.	Cr.
Dec. 31. Owe Michigan Buggy Co.		\$1,592 95
Less 15-5-2 percent.....		332 36
Net .. .. .		1,260 59
Dec. 31. Interest on \$6,000 at 6 percent .. .. .		360 00
Dec. 31. Taxes .. .. .		90 20
Dec. 31. Commission to Riter Imp. Co. .. .. .		20 00
Dec. 31. Commission due us outstanding .. .. .	\$ 712 56	
Dec. 31. J. W. Koontz, as per ledger .. .. .	180 84	
Dec. 31. A. J. Valiquette for Concord .. .. .	75 00	
Book Acct. ....	272 20	
Warehouse storage .. .. .	200 00	
Trip to factory .. .. .	76 05	
One Banner buggy on hand .. .. .	23 05	
Bryan & Nelson, Com....	8 17	
Freight on three cars buggies on hand.....	300 00	
Team .. .. .	475 00	
Dray .. .. .	185 00	
Harness, blankets .. .. .	55 00	
Mimeograph ... .. .	30 00	
Carpets ... .. .	40 00	
Sample room .. .. .	992 75	
Ledger, stationery and office supplies .. .. .	30 00	
Grips .. .. .	15 00	
Cash and check book....	149 75	
J. Hoeven, interest on money .. .. .		135 00
De Mots, interest on money ... .. .		131 70
A. Slob, interest on money .. .. .		105 00

De Mots, to equal salary of Hoeven .....	574 47
Slob, to equal salary of Hoeven ... ..	327 09
Depreciation on building	500 00
	<hr/>
	\$3,820 27    \$3,504 05
Hoeven, gain .....	105 44
De Mots, gain .....	105 44
Slob, gain .....	105 44

The following Exhibit 8 is a correct statement of the resources and liabilities of the firm on the date of the dissolution:

#### Resources.

Building .....	\$10,000 00
Commissions due, outstanding...	712 56
J. W. Koontz, as per ledger....	180 84
A. J. Valiquette .....	75 00
Book accounts .....	272 20
Warehouse storage .....	200 00
Trip to factory .....	76 05
One Banner buggy on hand.....	23 05
Bryan & Nelson, Com. ....	8 17
Freight on 3 cars buggies on hand	300 00
Team .....	475 00
Dray .....	185 00
Harness, blankets .....	55 00
Mimeograph .. ..	30 00
Carpets .....	40 00
Sample room .....	992 75
Ledger, stationery and office sup- plies .. ..	30 00
Grips .. ..	15 00
Cash and check book .....	149 75
Accounts—	
Gerrit De Mots....	\$275 80
Albert Slob .....	477 34
J. Hoeven .....	804 33
	<hr/>
Total resources .....	1,557 47
	<hr/>
	\$15,377 74

## Liabilities.

M. Buggy Co. ....	\$ 1,260 59	
Due on building .....	6,000 00	
Interest, 6 percent on \$6,000.00	360 00	
Taxes ... ..	90 20	
Commission to Riter Imp. Co....	20 00	
Capital—		
Gerrit De Mots...\$2,635 00		
Albert Slob .....	2,100 00	
J. Hoeven .....	2,700 00	7,435 00
Depreciation of building.....	500 00	
		<hr/>
Total liabilities .....		\$15,665 79
		<hr/>
Loss ... ..		\$ 288 05

There is no contradiction nor inconsistency between the items of assets and liabilities of the two statements. The fundamental difference between them is that Exhibit 6 was not a complete statement of assets and liabilities, in that it failed to include the \$10,000 building among the assets and failed to include the \$6,000 debt and the capital paid in among the liabilities. The effect of Exhibit 6 was to show an apparently large undivided profit. This profit purports to be applied to an equalization of the amounts drawn out by the respective partners. \$574.47 is applied to the credit of De Mots and \$327.09 to the credit of Slob "to equal salary of Hoeven." In like manner certain amounts were applied to the credit of each partner as interest in proportion to the capital paid in. The computation thus made purports to show a further net gain to each partner of \$105.44. The amount agreed to be paid to the plaintiff was made up as follows:

Capital paid in .....	\$2,100 00
Interest thereon .....	105 00
"To equal salary of Hoeven".....	327 09
One-third net gain .....	105 44
	<hr/>
Total ... ..	\$2,637 53

It is clear that there was no such profit to be divided as assumed in Exhibit 6. Omitting the item of \$500 for depreciation of building, there would be a net profit of \$212, not allowing any interest on capital. To find such profit, however, each partner must be treated as a debtor to the firm for the amount drawn out by him in the course of the year. In Exhibit 8 these amounts are charged as accounts against the respective members and are included in the assets, and this is a proper method of equalization. If \$500 be charged off for depreciation of building, then there was a net loss to the enterprise of \$288.05. That the plaintiff received much more than would be due him upon the invoice and the division of profits is mathematically certain. The question is, however, whether this amount was agreed upon as the result of a mutual mistake. It is contended by the plaintiff that he simply used these figures for his own guidance, and that he named a lump sum, and that the other parties accepted the offer.

The written contract entered into named the sum without stating any basis of computation. The plaintiff is entitled to stand upon it and to prevail unless the defendants have made a clear case.

There are a few details in the circumstances surrounding the transaction which throw considerable light upon the question. The defendants became somewhat dissatisfied with the plaintiff on the alleged ground that he was spending much time at his home in Sioux Center instead of at their place of business. On January 7th preceding the dissolution, they wrote him a somewhat peremptory letter, wherein they notified him that they had "decided to dissolve," and that "you can either buy or sell," and "we want you here not later than Monday to settle up." To this letter the plaintiff replied somewhat sharply on January 8th. On January 11th he made further reply thereto as follows:

Gerrit De Mots and Jacob Hoeven, Sioux City, Iowa.—  
Gentlemen: With further reference to your letter under

date of Jan. 7, inst., will say and you are hereby informed that I have decided and have chosen to sell out all my interest which I now hold in the firm of the Western Implement & Storage Co. of Sioux City, Iowa, and will be there tomorrow morning to start to take invoice. Yours truly, Albert Slob.

When the plaintiff arrived at the firm's place of business, he was requested by his partners to name a lump sum. He declined to do so and insisted upon an invoice. Four days were spent by him and Hoeven in the taking of such invoice. He testified that he fixed upon the amount upon the basis of the invoice, and that such amount included the items which we have heretofore indicated. The specific form of the amount as to dollars and cents tends to indicate that it was the result of computation of specific items. The letter of January 11th, which we have already quoted, purports to be an election on his part to sell upon invoice. His conduct afterwards was consistent with the purpose expressed in this letter. On the day of the dissolution and after the completion of the transaction, he discovered an item of \$3 in his own favor which had been overlooked. He made claim therefor to the defendants on the theory that it was an item overlooked. They recognized it as such and paid it. On the next day the defendants discovered the alleged mistake now complained of. They telephoned to him at once. It is undisputed that he said at that time, in substance, that if there was a mistake in the computation he would make it right. The only qualification which he attempts in his own testimony at this point is that he said that, 'if there was a mutual mistake in computing the figures which covered the amount for which I sold out, then I would make it right.'

We are convinced that both plaintiff and defendants understood that the amount to be paid to plaintiff was to be determined by computation from the invoice, and that the amount fixed upon was the result of mutual mistake. We think also that the defendants have proved such fact by that clear *quantum* of evidence which is required in order to justify the relief asked. That the plaintiff so understood it is indicated by his letter already referred to, by his in-

sistence upon an invoice, by the fact that four days were spent in taking an exact invoice, by the fact that there is not a disputed or uncertain item in the invoice, by the specific form of the amount agreed upon, by his own demand for rectification of error in his own favor, and by the fact that, after being advised by defendants of the alleged mistake, he repeatedly promised to rectify it without in any manner denying his duty or liability to do so. Doubtless, no one of these circumstances would of itself be very cogent, but taken collectively and in connection with direct evidence of the parties they are very persuasive. That the plaintiff agreed to stand a depreciation of \$500 on the building is practically undisputed, and the item appears as such in Exhibit 6.

Counsel for appellee urge upon us that substantially all the testimony offered by the defendants is incompetent as parol evidence tending to contradict a written contract. Such rule has no application to a suit in equity wherein the reformation of the written contract is the relief sought.

It is our conclusion that the relief prayed by defendants should be granted to the extent that the contract and note should be reformed as to the amount to be paid by the defendants. Exhibit 8, already referred to, presents a proper basis of computation. The case may be remanded for final decree with leave, however, to either party to present a computation and move for a decree here.

The judgment of the trial court is, accordingly, *reversed*.

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LESSIE GRACE, Administratrix, v. MINNEAPOLIS & ST. LOUIS RAILROAD CO., Appellant.

**Railroads: CROSSING ACCIDENT: NEGLIGENCE: EVIDENCE.** In this action for the death of an interurban conductor by a collision at a crossing of defendant's track, the evidence of negligence on

the part of defendant's engineer is such as to require a submission of that question to the jury.

**Same:** DUTY TO KEEP A LOOKOUT. Although a steam railway train is  
2 entitled to precedence on approaching an interurban crossing, and the employees of the interurban company are bound to keep a lookout for approaching trains, yet that fact will not justify the trainmen of the steam railway in assuming that the crossing is not a place of danger; but they are nevertheless required to keep a lookout to ascertain whether the crossing is in use by the interurban company when approaching it.

**Same:** INSTRUCTIONS: APPLICABILITY TO ISSUES. Where the failure  
3 of the engineer of a steam railway train to stop, as required by statute, on approaching the crossing of another like railroad was not alleged as a ground of negligence, and the court in its instructions made no reference to the subject, a requested instruction that the interurban railway, although at the time operating a train by a steam engine, was not a steam railway within the meaning of the statute requiring their trains to stop on approaching a crossing, was not within the issues and properly refused.

**Same:** EVIDENCE: HARMLESS ERROR. Where there was nothing in the  
4 evidence justifying a finding of negligence because of defendant's failure to stop its train on approaching the interurban crossing, admission in evidence of the articles of incorporation of the interurban railway, on the theory that they tended to prove that the railway might be operated in part by steam power, was not prejudicial.

**Same :** CROSSING AGREEMENT: CONTRIBUTORY NEGLIGENCE. A provision  
5 in the crossing agreement between the two companies that the interurban company on approaching the derauling switch should stop its cars and the conductor should proceed ahead and flag his car across, did not relieve the defendant from the duty of exercising care to avoid injuring the interurban employees on their train at the crossing; and where the rules of the interurban company authorized the flagging to be done by a brakeman instead of the conductor, and the injury to the conductor was not the result of the flagging operation, negligence of the conductor could not be predicated on the fact that he ordered the brakeman to flag his train across instead of doing it himself.

**Same.** Where a brakeman on an interurban train had read and  
6 knew the rules of the company, as to stopping and flagging the train over a crossing, and was in no sense an employee of the conductor, but a fellow servant for whose negligence the conductor was not responsible, and there was no evidence that the brakeman failed to perform his duty in flagging the train across,

the fact that the conductor failed to instruct the brakeman as to the method of flagging and the dangers to be apprehended from an approaching engine on defendant's track, was not such negligence on his part as to preclude recovery for his injury and death.

**Same: FELLOW-SERVANTS: IMPUTED NEGLIGENCE.** A brakeman employed by a railway company is not the servant or personal representative of the conductor of the train with respect to the conductor's safety, and they are not so related in the discharge of their duties that the negligence of one will be imputed to the other.

**Same: DEGREE OF CARE: INSTRUCTION.** Where an exercise of a high degree of care by decedent would not have averted the accident, the defendant was not prejudiced by an instruction that decedent was required to exercise reasonable care for his own safety rather than a high degree of care demanded by the circumstances.

**Same: DAMAGES: INSTRUCTION.** Where the jury in a personal injury action is limited to a consideration of the present loss to decedent's estate, and is told to consider only his age, occupation, wages, condition of health, ability to earn money, habits of industry and probable duration of life, concerning which there was evidence, and are further told that decedent was liable to die at any time, failure to instruct as to the contingencies of ill-health, non-employment, diminution of earning capacity, which are entirely speculative, and to suggest that a verdict for any amount not exceeding that prayed for, might be returned, was not erroneous, in the absence of a request therefor.

**Same.** Where the court made no suggestion in its instructions that it would be proper to return a verdict for the amount prayed for, and the verdict was for less than that amount, defendant was not prejudiced by an instruction limiting the recovery to the amount asked.

**Same: EVIDENCE: INTEREST TABLES.** Interest tables relate merely to matters of computation, and their exclusion when offered to show what a certain sum would amount to at different rates, for a period approximating decedent's expectancy, was not erroneous.

**Same: EXCESSIVE VERDICT.** In this action for the death of an inter-urban conductor, in view of his age, earning capacity and accumulations, a verdict for \$11,000, is held excessive and is reduced to \$8,000.

*Appeal from Polk District Court.*—HON. HUGH BRENNAN,  
Judge.

TUESDAY, DECEMBER 12, 1911.

ACTION to recover damages for the death of plaintiff's intestate, Bertram H. Grace, alleged to have been caused by the negligence of the employees of the defendant company in operating its road. There was a verdict for plaintiff, and from judgment on such verdict the defendant appeals.—*Affirmed on condition.*

*George W. Seevers, W. H. Bremner, and E. D. Samson, for appellant.*

*Bannister & Cox, for appellee.*

MCCCLAIN, J.—The defendant operates a line of railway from Minneapolis to Des Moines through the town of Perry, in Dallas county, and the Interurban Railway Company operates a line of railway from Des Moines through Perry, crossing the track of the defendant company at grade about a mile southeasterly from Perry. At this crossing, the line of defendant's railway runs approximately north and south, Perry being to the north, and the line of the interurban railway is approximately east and west. The general surface of the country is level, so that a train approaching the crossing from the north may be seen from the crossing for a distance of two or three miles. About 3 o'clock on the morning of December 16, 1909, an extra engine of defendant was being run from the north towards this crossing in charge of an engineer and fireman. The headlight and classification lamps on the front of the engine were burning. The engine was stopped for a few minutes at Perry, and then was started south towards the crossing in question at full speed; the object of the engineer being to reach the next station south, seven miles distant, in time to meet and pass a train scheduled to arrive from the south at that station in about fifteen minutes. As he was required by

the rules of defendant company to be in the clear at least five minutes before the time of the arrival of the train which he was to meet, he had not more than eleven minutes in which to run the distance of seven miles. At the crossing in question, the defendant's engine struck the caboose of a freight train on the interurban railway as it was crossing defendant's track, and instantly killed plaintiff's intestate, the conductor of the interurban freight, who was in the caboose.

The interurban railway is a trolley line, operated in general by electric power, but during the period of its construction an ordinary railway steam engine was used on its line, and this engine had, prior to the accident, been used to haul a freight train daily each way between Des Moines and Perry, although freight cars were also hauled by trolley engines. The freight train with which defendant's engine collided at the time of the accident was hauled by this steam engine.

At the crossing in question, no interlocking system had yet been installed, but there was a derailing switch on the interurban line, in the operation of which it was necessary that any car or train should be stopped before reaching the crossing, and could not proceed until an employee had gone ahead across defendant's track and closed the switch by means of a lever at a switch stand; there being such a switch stand on each side of the crossing at a distance of seventy-four feet to the west and sixty-five feet to the east of the crossing. These switch stands are on the south side of the interurban track. During the nighttime, each of these switch stands is provided with a light, about six feet from the ground, these lights being so arranged that when the switch is open they show red east and west along the interurban track and green to the north and south along the defendant's track; and when the switch is closed, ready for the crossing of defendant's track by the interurban cars, they show red along the defendant's track and green along the interurban track. Near the crossing is a signal standard, about twenty

feet high, belonging to and operated by the interurban company, so arranged that when the switch is open the light placed thereon shows green along the defendant's track and red along the interurban track, and when the switch is closed, ready for the crossing of defendant's track by the interurban cars, it shows red along defendant's track and green along the interurban track. The lights on the signal standard and on the switch stands were burning and in proper condition for operation at the time of the accident. By an agreement between the two companies, it was the duty of the interurban company to maintain the derailing switch, and stop its cars before they reached the defendant's track, and not to cause its cars to proceed across defendant's track until flagged over the crossing by the conductor, whose duty it should be to assure himself that no train or car was approaching the crossing upon the tracks of the defendant company, before closing the derailing switch and signaling his car or train to proceed.

The interurban freight train with which defendant's engine collided, hauled by a steam engine, as already indicated, consisted of four cars and a caboose; the total length of the train being about two hundred and thirty-four feet. As it approached the crossing from the east, it was stopped by the engineer before the derailing switch was reached, and one Davis, the head brakeman, carrying a lantern, got down on the north side of the engine and went ahead to the crossing, where he stopped, looking both north and south for approaching engines or cars on the defendant's line. Davis testified that he saw nothing that looked like a headlight or other light, or an approaching engine or train, and observed only two lights to the north, not moving, probably three-fourths of a mile distant. He then proceeded to the switch stand west of defendant's track, and lined up the derail by the operation of the switch, and again went back to defendant's track, and observed it in each direction without seeing any headlight approaching or hearing any whistle or bell;

whereupon he gave the signal to his engineer to come ahead on the crossing, standing in the middle of the track until the engine of his train reached him, when he mounted the engine; and that, as he was looking back to see if the rear brakeman was going to get off to operate the switch after the train had crossed, his attention was attracted by the exhaust of defendant's engine coming from the north, and he noticed sparks from its smoke stack. Although he at once warned his engineer of the approaching danger, defendant's engine struck the caboose before the train could be gotten clear of the crossing.

As to the negligence of defendant's engineer, there was a clear case for the jury. He testified that as he left Perry, he saw a green light on the signal standard at the crossing,

but did not look again at the light before the collision; and the evidence tended to show that had he looked he would have seen this

1. RAILROADS:  
crossing acci-  
dent: negli-  
gence: evi-  
dence.

light show red in time to have stopped his engine on the danger signal and avoided the collision, for, although the red lights on the switch stand may have been cut off from his view by the passing train, the red light on the signal standard could not have been thus obstructed from his view.

The contention for appellant is that its engineer was under no obligation to look out for such danger signal, as it was the duty of the interurban company to look out for an

approaching engine on the defendant's track, and have its train clear of the crossing. The

2. SAME: duty to  
keep a lookout.

argument is that the defendant owed no duty with reference to avoiding a collision at the crossing different from that which it owed to trespassers or mere licensees attempting to cross its track at any other place on its right of way; that is, the duty to avoid a collision, if possible, after the danger of such collision became apparent. It seems to us that this argument is not sound. The employees of defendant were bound to know that the crossing was a place of danger, and

that it might rightfully be in use by cars of the interurban company. The fact that the defendant's engine was entitled to precedence at the crossing, and that it was the duty of the employees of the interurban company to look out for the approaching engine on defendant's track, did not justify defendant's engineer in assuming that the crossing was not a place of danger. The situation was analogous to that existing where a highway crosses the track of a steam railroad. The trains operated along the railway track are entitled to precedence at such crossing, and the traveler on the highway approaching the crossing is bound to look out for approaching trains; nevertheless it is the duty of the engineer on such an approaching train to be on the lookout for persons at the highway crossing, and he is not justified in wholly disregarding possible danger to a traveler, and assuming that such traveler on the highway will avoid the possibility of being struck by an engine. *Illinois Central R. Co. v. Benton*, 69 Ill., 174; *Pittsburg, F. W. & C. R. Co. v. Dunn*, 56 Pa., 280; *Texas & P. R. Co. v. Cody*, 166 U. S. 606, (17 Sup. Ct. 703, 41 L. Ed., 1132).

The duty to be on the lookout for possible dangers to persons crossing the track exists also at places where, as is known to the railway company, persons are in the habit of crossing, although it is no public highway. *Thomas v. Chicago, M. & St. P. R. Co.*, 103 Iowa, 649; *Booth v. Union Terminal R. Co.*, 126 Iowa, 8; *Bourrett v. Chicago & N. W. Co.*, 152 Iowa, 579. And we have recently held that a railway company must exercise reasonable care to avoid injury to a landowner using a private crossing, although, of course, the trains are entitled to precedence at such crossings, and the landowner is under obligation to use the crossing with a view to his own safety with reference to its use by the railway company, and to keep out of the way of approaching trains. *Ressler v. Wabash R. Co.*, 152 Iowa, 449. Likewise, where a street railway line crosses a steam railway track, although the trains of the steam railway may be entitled

to precedence, and it may be the duty of the street railway employees to keep out of the way of a train on the steam railway track, nevertheless it is the duty of the employees of the steam railway in charge of its trains to be on the lookout for danger and give warning of their approach. *Missouri, K. & T. R. Co. v. Batsell*, (Tex. Civ. App.), 34 S. W., 1047. And the same rule applies as between two steam railway trains approaching a common crossing, although one of them may have the right of way over the other. *Chicago & A. R. Co., v. Rockford, R. I. & St. L. R. Co.*, 72 Ill., 34; *Pratt v. Chicago, M. & St. P. R. Co.*, 38 Minn. 455, (38 N. W., 356); *Chicago, K. & W. R. Co. v. Ransom*, 56 Kan., 559 (44 Pac. 6). It is clear, therefore, that the engineer on defendant's engine, charged with knowledge of the interurban crossing and of the right of the interurban railway to use such crossing, was bound to be on the lookout for danger at such crossing, and could not heedlessly approach it without observing whether a danger signal had been displayed.

II. If the interurban company was operating a steam railway, then, regardless of any agreement between the two companies, it was the duty of the defendant to stop its engine not less than two hundred feet from the crossing (Code, section 2073); whereas, if the interurban railway was a "railway operated by electric or other power than steam" (Code Supp., section 2033-a), then no such duty to stop rested upon the defendant company. Code Supp., section 2033-e. As the negligence of defendant's engineer might be shown, and was shown, otherwise than in failing to stop his engine before reaching the crossing, it is immaterial to determine what was the character of the interurban railway in this respect, unless it may be necessary to do so in order to determine whether there was error in giving certain instructions requested for the defendant. Failure to stop the engine on approaching the crossing was not alleged in the petition as

3. SAME: instructions: applicability to issues.

constituting negligence on the part of defendant's engineer, and the court, in its instructions, nowhere referred to any such duty. An instruction, asked by the defendant on the theory that the interurban railway, although it used this one steam engine in operating certain of its trains, was not a steam railway, but in the contemplation of statute an interurban railway, was not therefore pertinent to any issue in the case nor any question submitted by the court to the jury. The court imposed upon the defendant by its instructions no other duties than those to which it was subject, if the interurban railway were, within the meaning of the statute, operated by electric or other power than steam.

Error is assigned on the admission in evidence of the articles of incorporation of the interurban railway, on the theory that they tended to prove that it was a railway which

might be operated in part by steam power; and the argument now is that as this evidence was admitted the jury should have

been guarded against giving it improper application. In view of the questions submitted to the jury, the evidence was probably wholly immaterial, but we can not see that it could possibly have prejudiced the defendant. Nothing in the record would have justified the jury in finding negligence on the part of defendant in not stopping its engine before approaching the crossing, as required by statute in case of steam railway crossings, and no instruction on the subject was therefore necessary.

III. The contention that decedent was conclusively shown to have contributed by his own negligence to the injuries causing his death is presented in several phases.

It is said, in the first place, that it was his duty, under the agreement between the two companies and the rules of his own company, to have gone ahead of his train and himself given the signal to the engineer to proceed over the crossing.

4. SAME: evidence: harmless error.

5. SAME: crossing agreement: contributory negligence.

The agreement between the companies was immaterial on this question. Although it specified that when an interurban car or train approached the derailing switch it should stop, and the conductor should proceed to flag his train across, it did not relieve the defendant company from its duty to exercise care to avoid injury to the employees of the interurban company engaged on or about its train, and the injury to deceased did not result from the flagging operation having been performed by the head brakeman, instead of by the conductor, unless, indeed, as is argued, we should say that if the conductor had been performing this service, instead of remaining in the caboose, he would not have been injured. But the fact that under some other conditions he would not have been injured does not at all indicate that he was negligent in remaining on his train. The rules of the interurban company authorized the operation of flagging by the brakeman in place of the conductor, and in this respect no negligence of the conductor, in view of such rules, was shown.

In the second place, it is argued that the conductor was in charge of his train, and was negligent in not giving to the brakeman proper instructions as to the method of flagging and the dangers to be anticipated in the event that an engine was approaching on the defendant's track. There is much evidence in the record as to the rules and notices of the interurban company with reference to the flagging of trains across such crossings, and of the duties of conductors to advise themselves with reference to such rules and notices. We find it unnecessary to go into the details of this evidence. It appears that Davis, although an experienced brakeman on steam railroads, was running for the first time as brakeman on the interurban road; but he had been given a set of rules, and had read, among others, a rule to the effect that at railroad crossings cars must be brought to a full stop at a safe distance, and the motorman must not proceed until the con-

6. SAME.

ductor has gone ahead to the center of the crossing, looking both ways, and given the "come ahead signal." Davis must have known from this rule what he went ahead to look for, and must have understood that he was charged with the duty of looking out for an approaching engine on the defendant's track. The evidence shows that he did everything that he was required to do under the specific rules and notices relating to this crossing, and if the conductor did not give him full and specific directions, his failure to do so contributed in no way, so far as can be gathered from the evidence, to the accident. Davis was not employed by the conductor, but was a fellow servant, for whose negligence, if any, decedent was not responsible. The only negligence suggested on Davis' part was the failure to see the approaching engine after taking all the precautions which the rules required to be taken, or which could have been suggested by reasonable care.

In the third place, it is argued that the negligence of Davis must be imputed to decedent. If Davis had been the servant of decedent or his personal representative with reference to his own safety, there might be some basis for this argument; but counsel for appellant have not cited any authorities in support of the doctrine that, as between coemployees, the negligence of one is to be imputed to the other, unless it be the case of *Minster v. Citizens' R. Co.*, 53 Mo. App., 276, which seems to have been decided upon the authority of *Thorogood v. Bryan*, 8 C. B., 115, which has been fully and often repudiated as an authority in this state. See *McBride v. Des Moines City R. Co.*, 134 Iowa, 398, and cases there cited. And to the general effect that a conductor and a brakeman on a train are not so related in the discharge of their duties that the negligence of the latter will be imputed to the former, see *Baltimore & O. R. Co. v. Baugh*, 149 U. S., 368, (13 Sup. Ct., 914, 37 L. Ed., 772); *New England R. Co. v. Conroy*, 175 U. S., 323, (20 Sup. Ct., 85,

7. SAME: fellow-servants: imputed negligence.

44 L. Ed. 181). The abrogation in this state of the fellow servant rule as to railroad employees does not, of course, have the effect of making one of two coemployees, whose negligence occasions injury to the other, the servant of the latter, so that such negligence shall be imputed to him. The effect of our statute is to enlarge the liability of the employer, and not to impute to one employee, as contributory negligence, the fault of a coemployee which has occasioned the injury.

The cases cited by counsel for appellant, relating to alleged contributory negligence of decedent as conductor, are not in point. It is, of course, true that if the conductor of a train, in the exercise of his authority, causes the train to be operated in a negligent manner, or acquiesces in such negligent operation with knowledge thereof, or fails to discharge his duties as conductor in such a way as to contribute to his own injury, he can not recover on account of an accident to which he has, by his own fault, thus contributed. By way of illustration of the extent and applicability of these general propositions, see *Dewey v. Chicago & N. W. R. Co.*, 31 Iowa, 373; *Lane v. Central Iowa R. Co.*, 69 Iowa, 443; *Nordquist v. Great Northern R. Co.*, 89 Minn., 485, (95 N. W. 322). But decedent had the right, under the rules of the company, to direct Davis, as brakeman, to flag his train past the crossing in question, and when Davis undertook to discharge this duty he acted as the servant of the interurban company, and not simply as the servant or personal representative of the conductor. If Davis did those things which the rules of the company required to be done, then his negligence, if any, in not seeing the approaching train was the negligence of the company, and not the negligence of decedent; and it is immaterial in this case whether decedent gave to Davis all the instructions which should have been given to him, provided Davis did, under the circumstances, everything which the rules of the company required to be done. The negligent manner of

doing the acts required, and which Davis attempted to do, was not chargeable to the decedent. There was no violation of the rules on the part of Davis, nor omission of any precaution which the rules prescribed; if he was at fault, it was in failing to see what he should have seen while flagging the train through in the manner prescribed by the rules.

Instructions of the lower court, relating to the general subject of negligence and contributory negligence, are criticized, but on reading them together we see no just ground of

2. SAME: degree  
of care:  
instruction.

complaint. It would be futile to attempt a discussion of them, piece by piece, in order to prove that, taken together, they fully and correctly state the law. It is not contended that on the whole the propositions of law applicable to this case, relating to negligence and contributory negligence, were not sufficiently covered. With reference to the care required of Davis, it is contended that the jury was improperly directed to find whether he exercised ordinary care—that is, the care which a person of ordinary caution and prudence would exercise under the circumstances; the claim being that under the circumstances a very high degree of care was required. But we have already indicated that decedent was not chargeable with the negligence of Davis in performing the acts required to be performed in flagging his train over the crossing; that is, in not seeing what he ought to have seen in performing these acts. Therefore, if there was any error in this respect, it would not affect defendant's liability; for decedent was where he had a right to be, and had done everything which he was required to do. There was nothing in the rules of the company nor in the circumstances of the case requiring him to keep a personal lookout for an approaching engine on defendant's track, if his train was being flagged over the crossing in the manner required by the rules of his company. The definition of the care required of decedent as "reasonable care for his own safety," instead of the high degree of care which the circumstances

required, was immaterial, and not prejudicial, even if erroneous, for the jury could not have found that, even in the exercise of the high degree of care which the circumstances required, he omitted to do anything which, if done, would have tended to prevent the happening of the accident.

IV. As to measure of damages, there are assignments of error in the giving of instructions for failing to instruct the jury to consider contingencies, such as ill health, non-

9. SAME:  
damages:  
instruction.

employment, and diminution of earning capacity with advancing age, and in suggesting to the jury that a verdict might be returned for any amount, not exceeding \$15,000, the amount of recovery prayed for in the petition. These assignments are not well taken. The jury was limited to a consideration of the present pecuniary loss to decedent's estate resulting from his death, and allowed to take into consideration only his age, occupation, wages, condition of health, ability to earn money, habits as to industry, and probable duration of life, and was further told to bear in mind that deceased was liable to die at any time, and that there was no certainty that he would have lived to the end of his expectancy. These were the matters as to which evidence had been received. The instructions seem to be fully supported by what has been said by this court in *Lowe v. Chicago, St. P., M. & O. R. Co.*, 89 Iowa, 420; *Spaulding v. Chicago, St. P. & K. C. R. Co.*, 98 Iowa, 205; *Hammer v. Janowitz*, 131 Iowa, 20.

The elements of contingencies of life, such as ill health, nonemployment, and diminution of earning capacity as age advances were included in the instruction approved in the case last cited, but, as they are entirely speculative, we think that the omission to call attention to them does not constitute reversible error, unless a special and appropriate instruction is asked on the subject. These are matters of ordinary human experience which the jury may be presumed to take into account in determining what the decedent would probably have earned.

The necessary limitation of the verdict to an amount of recovery not exceeding that prayed for in the petition, was unnecessary, in view of the issues as stated to the jury, and might well have been omitted. But there

10. SAME.

was no suggestion that a verdict in the amount prayed for would be proper under the evidence, and the jury did not assume that it was so directed, for the amount allowed in the verdict returned was \$11,000; whereas the amount prayed for in the petition was \$15,000. There was no error in this respect in the instruction as given. *McGovern v. Interurban R. Co.*, 136 Iowa, 13.

V. The defendant offered in evidence certain interest tables, for the purpose of showing what one dollar will amount to at different rates of compound interest for periods approximating the expectancy of life of

11. SAME:  
evidence:

interest tables.

decendent. There was no error in rejecting these tables. They related to mere matters of computation, which could be made by any person able to compute interest. It is not contended that an instruction should have been given on the subject. If it was the duty of the court to advise the jury with reference to the method and basis of computing the present worth of decendent's prospective net earnings, the court could have done so on its own knowledge, without the introduction of such tables. They were no more necessary to enable the jury to reach a correct verdict than ordinary interest tables would have been, had the case involved the allowance of interest for a specified time, at a prescribed rate on a fixed sum of money.

VI. Finally, it is contended that the verdict was excessive, and this, to our mind, raises the most difficult question in the case. The deceased was twenty-eight years old,

12. SAME: exces-  
sive verdict.

with an expectancy of about thirty-five years, and in his employment as conductor, had been earning on the average about \$70 per month for three months preceding his death. Prior to that, in various occupations, he had been earning from \$50 to \$70 per month.

At the time of his death, he had accumulated an estate of about \$1,350. In similar cases, we have sustained verdicts ranging from \$5,000 to \$8,000. *Hively v. Webster County*, 117 Iowa, 672; *Haas v. Chicago, M. & St. P. R. Co.*, 90 Iowa, 259; *Locke v. Sioux City & P. R. Co.*, 46 Iowa, 109; *Rose v. Des Moines Valley R. Co.*, 39 Iowa, 246. We think that an allowance of more than \$8,000 as damages to decedent's estate, resulting from his death, would be excessive, and reach the conclusion that the trial court erred in sustaining the allowance made by the jury. If the plaintiff shall see fit to accept a judgment for \$8,000, the case may stand affirmed. On refusal to accept a judgment for that amount, it must be reversed. The plaintiff may file such election in this court within thirty days after the final announcement of this opinion, and have an affirmance entered. On failure to make such election, the case will be remanded, and the plaintiff will have the same time after remand to file such an election in the trial court. If no such election is filed on remand of the case, the lower court shall proceed to a new trial as upon a reversal. Costs of the appeal are taxed to appellant.

The judgment of the trial court is therefore *affirmed on condition*.

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JOHN B. HAMMOND, Appellant, v. MICHAEL WALDRON and  
H. L. LEYFERT, Appellees.

**Intoxicating liquors: CANVASS OF STATEMENT OF CONSENT: APPEAL: OPERATION OF SALOON.** A board of supervisors acts judicially and not ministerially in canvassing a statement of consent to the sale of intoxicating liquors; and as there is no provision of statute for a stay of proceedings the board's finding that the statement is sufficient remains in force pending an appeal to the district court from such finding by a citizen, and saloons may operate under it until the finding is reversed.

*Appeal from Polk District Court.*—HON. LAWRENCE DE GRAFF, Judge.

TUESDAY, DECEMBER 12, 1911.

Suit in equity to enjoin an alleged liquor nuisance. Trial to the court upon an agreed stipulation as to the facts. Decree dismissing the petition, and plaintiff appeals.—*Affirmed.*

*H. H. Sawyer*, for appellant.

*Thos. L. Sellers, E. T. Morris, and Guernsey, Parker & Miller*, for appellees.

DEEMER, J.—Early in the year 1911, there was filed with the county auditor of Polk county a statement of general consent to the sale of intoxicating liquors, purporting to have been signed by more than eighty percent of the legal voters of the town of Valley Junction, as shown by the pollbooks of the election of the previous year, and on the 13th day of February, 1911, the board of supervisors of said county canvassed the said statement and made a finding that the same was sufficient, which finding was duly entered of record. From this finding and within thirty days from the entry of record, an appeal was duly taken to the district court of Polk county, which appeal was pending at the time this suit was commenced. On the 5th day of June, 1911, the town council of the town of Valley Junction adopted a resolution consenting to the sale of intoxicating liquors in the said town by the defendant, Waldron, who was then and had theretofore been engaged in the sale of liquor in said town. Under previous statements and resolutions, defendant, Waldron, was authorized to sell such liquors until July 1, 1911, when a new law went into effect known as chapter 142 of the Acts of the 33d G. A. Other

provisions of the so-called "mulct law" were complied with by the defendant, and he continued to sell liquor after July 1, 1911, when his previous permission to sell expired, unless it be for the finding of the board of supervisors hitherto referred to under date of February 13, 1911. Defendant, Leyfert, is the owner of the property in which his codefendant was conducting the saloon in question, and as such, is made a party defendant. This appeal presents but a single proposition, which is thus stated for appellant: "If a board of supervisors finds a statement of general consent sufficient, and within thirty days thereafter, a citizen of the county files with the clerk of the district court a sufficient bond for the costs and denial as to the statement of consent, as provided in this section, can saloons operate until the district court adjudicates the case? In other words, does the entering of the general denial and filing of a bond by a citizen of the proper county revoke the findings of the board of supervisors as provided in this section, or may saloons operate under such a petition until the canvass and decision by the district court?"

The provisions of the "mulct law" with reference to the course to be taken before one may sell liquors in this state without being subject to the penalties, etc., of the prohibitory liquor law are well understood and need not be set out in this opinion. The only sections which need be referred to are 2450 and 2451, which, so far as material, read as follows:

All statements of general consent, filed with the county auditor as provided in the two preceding sections, shall be publicly canvassed by the board of supervisors, at a regular meeting, . . . and its finding as to the result in the city having over five thousand inhabitants, or the county, as the case may be, and the various towns and townships therein, shall be entered of record. And such finding shall be effectual for the purpose herein contemplated until revoked as herein provided. If the board shall find the statement sufficient, any citizen of the county may, within thirty

days thereafter, upon filing a sufficient bond for the costs, file with the clerk of the district court a general denial as to the statement of general consent, or any part thereof, whereupon the county attorney shall cause notice thereof to be served upon the person or persons filing said statement of consent with the county auditor, and said party shall, within ten days, file with said clerk a bond conditioned to pay the costs of the hearing in the district court, in a sum to be fixed by the clerk of said court. If such bond be filed, then the auditor shall certify the statement of consent and all papers and records to the district court, where the matter shall be tried de novo, the county attorney appearing for the state, but if no bond be filed, then the order of the board of supervisors finding the statement of general consent sufficient, shall be considered and treated as set aside and null and void. . . . Should the board of supervisors find the statement of general consent insufficient, any party aggrieved may appeal therefrom to the district court by filing, within thirty days thereafter, with the clerk of said court, a sufficient bond for the costs. Upon the filing and approval of said bond, the auditor shall certify the statement of consent and all papers and records to the district court, where the matter shall be tried de novo. . . . When said petition of general consent is found sufficient by the board of supervisors or the city council, as the case may be, it shall, unless revoked under section twenty-four hundred and fifty-one (2451) of the Code, be in force and effect for the period of five years only; and all petitions and statements of general consent in force and effect previous to the first day of July, nineteen hundred and six (1906) shall, unless revoked under section twenty-four hundred and fifty-one (2451) of the Code, be and become null and void on and after five years from July 1, 1906. Code Supp., section 2450.

Whenever any of the conditions of the third preceding section shall be violated, or whenever the council of the city or town or city acting under special charter shall, by a majority vote, direct it, or whenever there shall be filed with the county auditor a verified petition, signed by a majority of the voters of the said city, town, or city acting under special charter, or county, as the case may be, as shown by the last general election, requesting it, then the

bar to proceedings as provided in the second and third preceding sections shall cease to operate, and the persons engaged in the sale of intoxicating liquors shall be liable to all of the penalties provided in this chapter. Code Supp., section 2451.

The board of supervisors found the general statement of consent sufficient and entered its finding of record, and a citizen of the county appealed from the finding and filed a bond as required by law. Did this appeal supersede the finding of the board, and was it unlawful for one to sell liquor after such finding, there being an appeal therefrom to the district court? The statutes, in substance, say that the finding of the board is to be in force and effect for the period of five years unless revoked, and revocation is provided for in section 2451. As there was no attempt at revocation, we need not consider the force to be given section 2451, and we refer to it in order to gather the legislative intent as to the effect to be given the finding of the board of supervisors regarding the sufficiency of the statement of consent. The primary question in the case is: Does the board of supervisors act judicially in canvassing the statement of consent, or is it an act ministerial, being but one of the required steps to be taken in effectuating a bar to proceedings under the mulct law? In other words, is the finding of the board but a ministerial duty amounting to nothing and affording no protection in case of appeal to the district court? The legislative history of the act as it now appears is such as to lead us to the conclusion that the intent of section 2450 was to confer judicial or quasi judicial powers upon the board with reference to this matter. As originally written, the mulct law contained no provision for a canvass by any one of the statements of consent. The whole matter was left to judicial inquiry, and no one could say with any assurance whether or not there was a right to sell until some case was brought into court which challenged the sufficiency

of the statements. See chapter 62, Acts 25th General Assembly.

This was found to be intolerable, and the Legislature which adopted the Code of 1897, upon recommendation of the Code Commission, enacted what is now substantially section 2450, before quoted. As a reason for its recommendation, the Code Commission said: "The only material change here is the provision in the first subdivision that the board of supervisors shall determine the sufficiency of the statement of consent which is required to be signed by a majority of the voters in a city of five thousand or over (or by a larger percent in smaller cities and towns), and when that is found sufficient, it shall continue effectual until revoked as provided for in No. 70 below. There should be some tribunal to determine the question and it is not one easily determined by the courts. When settled, it ought not to be subject to be reopened on every occasion when it may be insisted perhaps that the signers no longer constitute a majority of the voters by reason of increase or changes in the voting population. The term 'general consent' is used to distinguish the statement signed by the voters from that which must be obtained from adjacent property owners before the business can be conducted in any particular locality."

This clearly indicates that the power conferred upon the board was intended to be judicial. In addition to this, a change was also made in what is now known as section 2448, so as to make it read:

In any city, including cities acting under special charters, of five thousand or more inhabitants, no proceedings shall be maintained against any person who has paid the last preceding quarterly assessment of mulct tax, nor against any premises as a nuisance on account of the selling or keeping for sale therein or thereon, by such person, of such liquors, provided the following conditions are complied with; and in any city of over twenty-five hundred and less than five thousand inhabitants, when a written statement

of consent that intoxicating liquors may be sold in such city, signed by eighty percent of the voters residing in such city, voting therein at the last preceding election, as shown by the poll list of said election, shall have been filed with the county auditor, and shall, by the board of supervisors, at a regular meeting, or at a special meeting called for that purpose, have been held sufficient, and its findings entered of record, which statement when thus found sufficient, shall be effectual for the purpose herein contemplated until revoked, said city shall come within the provisions of this section: (1) A written statement of general consent that intoxicating liquors may be sold in such city, signed by a majority of the voters residing in such city, voting therein at the last preceding election, as shown by the poll list of said election, shall have been filed with the county auditor and shall, by the board of supervisors, at a regular meeting, have been held sufficient, and its finding entered of record, which statement when thus found sufficient, shall be effectual for the purpose herein contemplated, until revoked, as hereinafter provided.

The Legislature might undoubtedly have made the finding of the board conclusive and made no provision for review. But instead of doing so it authorized a review by the district court of the finding, no matter what the conclusion of the board. In providing for this review it did not authorize a suspension of the order and finding of the board pending the appeal, or provide for any sort of supersedeas in terms. If the findings of the board are judicial, the right to supersede upon appeal must be implied, for there is no express provision. Now, while we have no decisions upon the exact proposition before us, in *Hill v. Gleisner*, 112 Iowa, 397, we said:

Said section 2450 provides that all statements of general consent shall be canvassed by the board of supervisors, and its findings entered of record. These boards, and they alone, are authorized to make the canvass and findings, subject only to review on appeal. The statute does not specify the manner in which the canvass shall be made, but does require that they find whether the statement is sufficient.

In determining this, many questions may arise that can not be answered from the statement of the pollbooks, such as questions as to the identity of persons, the genuineness of signatures, and the like. This case affords an apt illustration. We have seen that it was the duty of the board to determine whether this statement of general consent was signed by a majority of the voters of the town of Ossian. Now, as there were no separate pollbooks for that town, the board must, of necessity, hear evidence as to who of the voters of Ossian appeared upon the pollbook of the township and the statement of consent. We think it follows, from the authority conferred, that the board has power to hear evidence upon which to determine the sufficiency of the statement of consent. Power to make the canvass and findings being conferred upon the board alone, and its findings made effectual for the purposes contemplated until revoked, we conclude that its findings can only be questioned on appeal and therefore, evidence to show that a majority of the voters of Ossian signed this statement of consent is not admissible in this case. The board of supervisors did not find that this statement of consent was signed by a majority of the voters of the town of Ossian, and, as it is such a finding by the board or on appeal that constitutes the bar to this action, we conclude that the district court properly held that this action is not barred, and, this being the sole defense, the decree of the district court is correct.

Again, in *Schuneman v. Sherman*, 118 Iowa, 230, we said:

In *Hill v. Gleisner*, 112 Iowa, 397, we held, in effect, that the board of supervisors is made a special tribunal for the determination of the sufficiency of the statement of consent, not only as to the county at large, but also as to each and every subdivision thereof, that its findings can only be questioned on appeal, and that parol evidence is inadmissible, in the absence of a finding by the board as to the sufficiency of the statement of consent. That conclusion we still adhere to, believing it to be perfectly sound and eminently just. . . . At the trial in the district court, defendant and intervener offered to show that more than a majority of the legal voters then living in what is now the town of Terrill had signed the statement of consent,

and it is now agreed, for the purposes of the case, that this was a fact, although not so found by the board of supervisors. . . . The *Hill v. Gleisner* case, to which we have referred, unequivocally holds that the board of supervisors is the only tribunal for the decision of the question here presented, in the absence of an appeal from the findings of that body. There may have been no such findings in this case, and defendants are relying on extrinsic evidence for proof of the sufficiency of the statement as to the town of Terrill. . . . The district court had no power to canvass the statement of consent, except on appeal from the board of supervisors; and, as we have said, we have no occasion to determine whether or not the board could have done so. Defendant could in any event have protected himself by procuring a new statement of consent, and securing a finding as to the sufficiency thereof by the board of supervisors. Any other rule than the one we have announced would be productive of much mischief, and entail upon courts investigations from which they should so far as possible be relieved. . . . There is but one safe and logical rule, and that is to leave the determination of the question of the sufficiency of the statements of consent for any locality where it logically and properly belongs—with the board of supervisors.

From these quotations it is apparent that we have heretofore regarded the action of the board in passing upon these statements of consent as judicial in character, and the removal of the matter to the district court as an appeal. There are also some analogous cases which should be noted.

In *Baker v. Board of Supervisors*, 40 Iowa, 226, it was held that the action of a board of supervisors in the matter of the relocation of county seats in determining whether or not the petition was signed by a majority of the legal voters of the county is judicial in character and conclusive until set aside by appeal or other direct method of review. In that case we said: "No other tribunal is constituted for the determination of the question whether the petition is signed by the requisite number of persons, and as that question precedes, and is essential to, the mak-

ing of the order, it must be determined by the board. Their decision of that question is judicial, and their judgment becomes, like every other judicial determination, conclusive until reversed or set aside upon appeal, writ of error, certiorari, or other method provided for a direct review." This was followed in *Bennett v. Hetherington*, 41 Iowa, 142, and we quote the following from the opinion in that case:

The action of the board of supervisors in determining whether the petition was 'signed by at least one-half of all the legal voters in the county,' and also whether 'the notice hereinbefore prescribed has been given,' was necessarily judicial. For such, and many other purposes, the board of supervisors constitute a judicial tribunal having limited jurisdiction. The statute, in express language, gives to the board, jurisdiction to determine those questions. Having jurisdiction to determine them, their decision is as conclusive as that of any other judicial tribunal, until it is reversed or set aside in some manner provided by statute. The board decided that the requisite number of voters had signed the petition, that the notice itself was sufficient, and that it had been given or published in the manner and length of time prescribed by the statute. As we have seen, the board of supervisors had jurisdiction, by express statute, to determine these questions, and, if they did not decide them correctly, it was an error or irregularity only, which might have been corrected either by appeal, writ of error, or certiorari, whichever the statute may authorize, but which could not render their decision void. Their decision is binding and conclusive upon any other tribunal, when assailed collaterally, until it is reversed or set aside. If the notice was not given the number of days required by law, their decision was erroneous simply, and must be corrected as other errors are corrected. *Ballinger v. Tarbell et al.*, 16 Iowa, 491; *Shea v. Quintin*, 30 Iowa, 58. See, also, *Cooper v. Sunderland*, 3 Iowa, 114; *Morrow v. Weed*, 4 Iowa, 77; *Baker v. Chapline*, 12 Iowa, 204; *Bonsall v. Isett*, 14 Iowa, 309. See, also, *Ryan v. Varga*, 37 Iowa, 78.

The plaintiff in this case is making a collateral attack

upon the finding of the board of supervisors, and, if our previous cases announce the proper rule, he should not be permitted to do so. Defendant Waldron complied with the statute in filing the various papers required of him, and the board of supervisors had found and entered of record a statement that the general statement of consent was sufficient. True, an appeal is pending; but the appeal did not of itself suspend or supersede the finding or order. It remained in full force until reversed or set aside by direct proceedings. The statute does not provide for a stay, and, as the order was self-executing, it could not be stayed in the absence of express statutory authority. *Allen v. Church*, 101 Iowa, 116; *Jayne v. Drorbaugh*, 63 Iowa, 715; *Lindsay v. Court*, 75 Iowa, 509; *Manning v. Poling*, 114 Iowa, 20.

Again, section 2450 expressly provides that if a citizen appeals from a finding that the statement of consent is sufficient, and the persons filing the statement shall thereafter fail to give bond for costs within a time fixed, the finding of the board shall be treated as set aside, null, and void. The necessary inference from this is that, if the bond is given, the finding is to be treated as in force and presumptively correct. Appellant's counsel have cited no cases which run counter to these views, and we are clearly of opinion that the taking of the appeal did not supersede the order of the board. What effect should be given a reversal of the board's finding by the district court or this court we have no occasion to determine.

From what has been said it follows that the decree must be, and it is, *affirmed*.

J. C. PAYNE, Appellee, v. WATERLOO, CEDAR FALLS &  
NORTHERN RAILWAY COMPANY, Appellant.

**Street railways:** CARE IN OPERATION OF CARS. A street railway com-  
1 pany does not have the exclusive right to its part of the street  
but must exercise a constant lookout for a clear track and keep  
its cars under reasonable control.

**Same:** PROXIMATE CAUSE. Where negligence of the company in the  
2 operation of a car is shown, the question of whether the fright  
of a horse and its swerving upon the track in front of the car  
was an independent proximate cause of the accident, or merely  
a contributing cause, is for the jury.

**Instructions:** FAILURE TO NUMBER SAME. While the trial court should  
3 number the paragraphs of its charge, still if the court's atten-  
tion is not called to the omission and exception taken thereto  
at the trial it is too late to complain on appeal.

**New trial:** REMARKS OF COURT. Where no exception is taken to  
4 remarks of the court during the progress of the trial they can  
not be made the basis of error on appeal.

**Jurors:** CHALLENGE. Challenge to a juror for cause must specify  
5 the ground, to be made the basis of an exception on appeal.  
And where the challenge is on the ground of the relation of  
client and attorney and the examination of the juror discloses  
that such relation has terminated the court is justified in over-  
ruling the challenge.

**Street railways:** SPECIAL INTERROGATORIES. Special interrogatories  
6 should call for a finding upon ultimate facts. So that where  
the pivotal question was whether the proximity of the plaintiff  
to the street car track was observable to the motorman in time  
for him to have avoided the accident by the exercise of reason-  
able care, interrogatories regarding the actions of the horse draw-  
ing the vehicle in which plaintiff was riding, which were prac-  
tically undisputed, did not call for ultimate facts and were prop-  
erly refused.

**Same:** EVIDENCE: WARNING OF DANGER. The testimony of plaintiff  
7 in this action, as to warning the driver of the vehicle in which  
he was riding, of the danger to be apprehended from the ap-

proaching car, and indicating care on his part, was admissible for that purpose.

**Same: EVIDENCE: EXAMINATION OF WITNESSES.** Error can not be  
8 predicated on the exclusion of an answer where the witness had fully testified to the fact which the interrogatory was intended to draw out; or where the question is renewed in slightly different form and fully answered.

**Same: EVIDENCE: DISCRETION.** The court's discretion in sustaining  
9 or overruling objections to questions on the ground that they are leading and suggestive, or as improper redirect examination, will not be interfered with where no abuse of such discretion is made to appear.

**Same: CONCLUSION: IRRELEVANCY.** The mere conclusion of a wit-  
10 ness is not admissible; and where the questions and answers do not fairly tend to aid the jury in ascertaining the facts relating to the matter under consideration, the evidence should be excluded.

**Same: EVIDENCE: SPEED OF STREET CAR.** It is not necessary that a  
11 witness be an expert to testify to the rate of speed of a street car, nor need he give his opinion of the number of miles per hour the car traveled. In the instant case the evidence should have been received, but in view of the entire record its exclusion was not prejudicial.

**Same: EXCESSIVE VERDICT.** A verdict for \$6,000, for severe and per-  
12 manent injury to the foot of plaintiff, who was a locomotive engineer, forty-five years of age, earning about \$100 a month, with prospects for increased salary, and who was confined in a hospital for five weeks with medical and surgical expense of \$800, is held not excessive.

*Appeal from Blackhawk District Court.—HON. C. E. RANSIER, Judge.*

TUESDAY, DECEMBER 12, 1911.

**ACTION** against a street railway company for personal injuries resulting from collision on the street. There was a verdict for the plaintiff. Defendant appeals.—*Affirmed.*

*Mullan & Pickett and F. E. Farwell, for appellant.*

*J. T. Sullivan and Edwards & Longley*, for appellee.

EVANS, J.—At the close of the evidence, the trial court overruled defendant's motion for a directed verdict. We will give our first attention to the error assigned on such ruling.

The accident involved occurred about ten o'clock in the morning on February 11, 1909, on Fourth street, in the city of Waterloo. The plaintiff was riding in a cutter with one Dr. Dunkelberg, who was the owner and driver of the horse and cutter. In this part of the city Fourth street extends due north, and the plaintiff and Dunkelberg were driving north thereon. The defendant's street railway is laid along the center line of such street. Between the railway and the curb was a space of about seventeen feet. The plaintiff and Dunkelberg were driving on the east side of the track within such space. There was considerable testimony that the horse became frightened and swerved toward the track and into dangerous proximity thereto, and that Dunkelberg was unable to control him in time to avoid a collision. Under the evidence the horse and cutter were from thirty feet to seventy-five or eighty feet in front of the car when the horse "lunged" toward the track. The corner of the car caught the cutter, and pushed horse and cutter before it for a distance of from sixty to ninety feet before it stopped. Both the occupants of the cutter were thrown out to its right side, and the plaintiff was severely injured in one of his feet. The petition charged that the car was run at a high and dangerous rate of speed and that the defendant negligently failed to stop the car after discovering plaintiff's danger and his proximity to the track. The general ground urged in support of the motion to direct the verdict was, and is, that the evidence failed to show that the accident was caused by any negligence of the defendant, and that the evidence did show conclusively that the fright of the horse was the independent proximate

cause of the accident. We can not incorporate herein the details of the evidence. It was sufficient to permit the jury to find that the car was not being operated under proper control.

I. The street railway does not have the exclusive right to its part of the street, and it must necessarily exercise a constant lookout for a clear track. This means, also, that it must operate a running car under reasonable control. If it be true that the horse in its fright swerved upon the track so suddenly and so close to the approach of the car that the motor-man could not, with reasonable diligence, have prevented the collision, then the defendant was not liable. But the evidence on this point was not so conclusive as to take the case from the domain of the jury. Granting that the accident would not have happened if the horse had not become frightened and shied toward the track, it does not follow necessarily that this became an independent cause of the accident.

If the defendant was in fact negligent, as charged in the petition, in the method of operating its car, then it was a question for the jury under proper instructions whether the fright of the horse and his swerving upon the track was an independent proximate cause, or whether it was merely a contributing cause of the collision. *Railroad Co. v. Bloch*, 55 N. J. Law, 605, (27 Atl. 1067, 22 L. R. A. 374); *Searles v. Railway Co.*, 70 N. J. Law, 388, (57 Atl. 134); *Newport News v. Nocolo Poolos*, 109 Va. 165, (63 S. E. 443); *Olney v. Omaha Railway*, 78 Neb. 767, (111 N. W. 784). The motion to direct was properly overruled.

II. Appellant complains because the trial court failed to number the paragraphs of its instructions as required by section 3708 of the Code. Concededly this provision of the statute ought to be obeyed. If the attention of the trial court had been directed to the omission, it would

doubtless have been supplied. We think it devolved upon the appellant to point out the omission and take exception thereto in the trial court at or before the time the instructions were given.

3. INSTRUCTIONS:  
failure to  
number same.

Having passed the matter at that time without objection, it is too late to complain now. *In re Evans*, 114 Iowa, 240; *Johnson v. Sioux County*, 114 Iowa, 137.

Appellant complains generally of the instructions, in that they were not fairly intelligible to the jury, and pleads his inability to specify the particular instructions complained of, because of the failure of the court to number the paragraphs as already stated. We have examined the instructions, and do not find them amenable to the criticism made upon them, except in the failure to number the paragraphs. One specific part of the instructions is embodied in the argument of appellant, and is challenged on the ground that it deals with questions outside of this record. Without setting forth the specific portions complained of, it is sufficient to say that it must be considered with its context, and that it was a proper explanation to the jury of the general nature of the duties imposed by law upon defendant and its employees. No other specific objection to the instructions is brought to our attention.

III. Complaint is made of certain remarks of the court made during the trial. It is said that they were in their nature extremely prejudicial. Two instances only are

preserved in the record, and they were made in connection with rulings upon the testimony. It is perhaps true that each of them

4. NEW TRIAL:  
remarks  
of court.

indicated a misapprehension on the part of the court as to the real state of the record. In that sense they might be misleading to the jury. They do not, however, impress us as being important or prejudicial to any degree. If they were, we would have to say, nevertheless, that appellant took no exception thereto, and that it is not in a position to be heard thereon now. *Osborn v. Ratliff*, 53 Iowa, 748.

IV. The appellant challenged the juror Banfield for cause. The challenge was in these words: "Defendant challenges juror Banfield for cause." The challenge was overruled and exception taken thereto. The ground of challenge which is urged upon our attention is that one of the attorneys in the case was attorney for the juror in a proceeding pending in such court. This ground of challenge was made in the trial court only by inference to be drawn from the nature of the examination of the juror. We have held that a challenge to a juror for cause can not be made the basis of an exception to be heard on appeal, unless the challenge states the ground thereof. *Bonney v. Cocke*, 61 Iowa, 303; *Haggard v. Andrew*, 107 Iowa, 417. It is to be said, also, that the final examination of the juror by the court indicated that the relation of client and attorney between the juror and plaintiff's attorney had terminated. The court was warranted in finding such to be the fact, and in overruling the challenge on that ground.

V. Appellant presented the following special interrogatories, and asked that they be submitted to the jury:

(1) Did the horse, which was attached to the cutter in which plaintiff was riding, suddenly and just prior to the accident, shy toward the railway track of the defendant?

(2) Was the horse and cutter in which plaintiff was riding being driven in a place of safety by the witness Dunkelberg along Fourth street until the horse shied toward the railway track?

(3) Would the cutter in question have been struck by defendant's car except for the shying of the horse toward the railway track?

These interrogations were refused, and complaint is made of such refusal. We think that none of these questions called for an ultimate fact. We must assume that the appellant would ask the jury to answer the first two questions in the affirmative, and the third in the negative.

Such finding would not determine any element of the plaintiff's case or of the defendant's defense. The

6. STREET RAIL-  
WAYS: special  
interrogatories.

"shying of the horse" was one of the circumstances of the case. It was practically undisputed. It was contended for by the defendant in evidence and pleaded by the plaintiff in his petition. The crucial question in the case was whether his proximity to the track was observable to the motorman for a sufficient time before the collision to have enabled him in the exercise of ordinary care to have avoided the accident. These interrogatories do not fairly touch that question. We think the trial court was justified in refusing them.

VI. Complaint is made of many of the rulings of the trial court upon the admission of testimony. We can not deal specifically with all of them without extending this opinion unduly. The plaintiff testified that

7. SAME: evi-  
dence: warn-  
ing of danger.

just before the collision he looked over his shoulder, and saw the car coming. The following question was put to him by his own counsel: "What, if anything, did you say to Dr. Dunkelberg when you discovered the car approaching at this rate of speed? Answer: I told him that there was a car coming, and that it was going to hit us." Proper objection was made both to the question and to the answer as incompetent and self-serving declaration, and the point is now urged upon us. The manifest purpose of the question was to show that the plaintiff used care to warn the driver of the vehicle of impending danger as soon as he discovered it. The testimony was admissible for such purpose. The appellant could have had it limited to such a purpose if he had so asked. The trial court struck out the last part of the answer "that they were going to hit us," and overruled the defendant's objection to the rest of the answer. The ruling was proper.

The following cross-examination of plaintiff was objected to by his counsel, and the objection was sustained:

“Didn’t Dr. Dunkelberg tell you, and didn’t you tell a great many people at that time, that the horse shied at that pile of brick, and brought you up so close to the car track that the car struck you?” Also: “And that was the common purpose of both you and Dr. Dunkelberg at that time for him to take you in the cutter and carry you out to the place where you desired to go, to the north end of town, was it not?” As to the first question the plaintiff answered freely that he had told many people that the horse shied at the pile of brick. As to the second question, it was renewed in a slightly different form and fully answered immediately following the ruling of the court. No ground of complaint is shown here.

A number of objections to evidence were made by defendant on the ground that the questions were “leading and suggestive,” and on the ground that they were not proper redirect evidence, and should have been made a part of the main case. As to all such objections, it is sufficient to say that it was within the fair discretion of the trial court whether to sustain or to overrule. No abuse of discretion appears.

VII. It appeared from the testimony of some of the witnesses for the defense that the rails were slippery with “sweat,” and that this fact made it more difficult to stop the car. In rebuttal the following question was put to the plaintiff as a witness: “I will ask you to state whether you know what the weather conditions were in respect to whether they were such as would cause the rail to ‘sweat.’ (Defendant objects as incompetent, calling for a conclusion of the witness and not a statement of fact. Objection overruled, defendant excepts.) A. They were not.” We think the objection was good, and ought to have been sustained. The question was not fairly adapted to aid the jury in determining whether the rails had “sweat” or not. The question and answer fur-

8. SAME: evidence: examination of witnesses.

9. SAME: evidence: discretion.

10. SAME: conclusion: irrelevancy.

nished no information as to what the weather conditions in fact were; nor as to what weather conditions would produce "sweat."

These points, however, were covered to some extent by the preceding examination of the witness and afterwards by his cross-examination. On the whole we reach the conclusion that the error was not prejudicial.

VIII. Mrs. Simpkins was a witness in behalf of the defendant. She was a passenger on the car at the time of the collision. She testified:

I was accustomed to riding on the car frequently. . . . I remember about the rate of speed at which the car was going before it struck the cutter. Q. Now, just tell the jury in your own way, Mrs. Simpkins, at what rate of speed this car was running before it struck the cutter. A. I should say it was running at the usual rate of speed. (Plaintiff moves to strike the answer as immaterial and incompetent. Motion sustained. Defendant excepts.) Q. Now, just tell, Mrs. Simpkins, in your own way, whether the car was running rapidly, or whether it was running slowly, or at an ordinary rate. A. Just ordinary rate, I should say, not any more than usual. (Plaintiff moves to strike the answer as immaterial and incompetent. Motion sustained. Defendant excepts.) Q. Now, the question is, was it running very rapidly, or was it running at an ordinary rate of speed? By the court: She answered it, and the answer was struck out. Q. What did you say as to whether it was running rapidly or not, Mrs. Simpkins, or at a high rate of speed? A. I don't know how to answer it hardly. Q. Just answer it the best you can. A. I don't think it was running rapidly—any more than it generally does, as I say. (Plaintiff moves to strike the answer as immaterial and incompetent. Motion sustained. Defendant excepts.) By the court: You will direct your examination along some other line. Witness has stated she does not know anything about the number of miles per hour, and does not claim to be an expert and able to pass on that question. By Mr. Mullan: It does seem to me she ought to be permitted to say whether it was running rapidly or not. By the court: I think the questions and answers

have already clearly demonstrated to what extent she herself thinks she is qualified to answer.

We think the trial court erred at this point. It is not necessary that a witness should be an expert in order to testify as to rate of speed. *Chipman v. Pacific Ry. Co.*, 12 Utah, 68, (41 Pac. 563); *Johnson v. Oakland, etc., Ry. Co.*, 127 Cal., 608, (60 Pac. 170); *Potter v. O'Donnell*, 199 Ill., 119, (64 N. E. 1027); *Robinson v. Louisville Ry. Co.*, 112 Fed. 487, (50 C. C. A. 357).

11. SAME: evidence: speed of street car.

Nor is it necessary that a witness should state his opinion in miles per hour. The opinion of a witness in such a case is a mere approximation in any event. The witness who attempts to be specific and exact as to such rate of speed is often more to be distrusted than one who speaks in more general terms. Such evidence in either form is never conclusive, and seldom very satisfactory, but it is often the best that can be had in the nature of the case. The plaintiff testified that he looked backwards over his shoulder and saw the car seventy-five or eighty feet behind him, and that it was coming at twenty-five or thirty miles an hour. The proffered testimony of Mrs. Simpkins was fairly responsive to such testimony of plaintiff, and was quite as competent. There was other testimony showing the ordinary and usual rate of speed on this part of the route.

It is the view of the majority, however, that upon the whole record the exclusion of the proposed evidence was not prejudicial. The writer hereof is not able to reach this conclusion; the issue of fact at this point being vital to the case.

The verdict was for \$7,000. It is claimed to be excessive. The trial court gave plaintiff the option to accept judgment for \$6,000, or submit to a new trial. Appellant complains that the amount so fixed is also excessive. The plaintiff sustained severe injury to his foot. It resulted in the loss by sloughing of his

12. SAME: excessive verdict.

little toe and one of the toes next thereto, and of the first joint of his large toe. The foot was scraped in such a way as to remove a large area of cellular tissue. The foot has now a large amount of scarred tissue which is thin and sensitive and especially so to the cold. The loss of cellular tissue also leaves his foot to a degree uncushioned, and makes the use of his foot more or less painful. He was confined in the hospital five weeks and suffered much pain. His medical and surgical expenses amounted to about \$800. He is a locomotive engineer by trade. As such, he was able to earn about \$102 per month. Since his recovery he has gone back upon the same run and at the same wages. He was forty-five years of age. There were possible selections before him, subject to the seniority of other engineers, to runs that would pay from \$170 to \$180 per month. For three or four years before his accident he was engaged in the land business, and only worked about one-third of the time as an engineer. It is manifest that the damage suffered by him is very substantial.

On the other hand, the judgment is very large, and we are not without grave doubt as to whether it should stand. We reach the conclusion, however, that we can not properly interfere with it.

The judgment below is therefore *affirmed*.

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ANNA WILTSEY and FRANK E. WILTSEY, Appellees, v. SPENCER WILTSEY and Others, Appellants, and Same Plaintiffs, Appellees, v. SPENCER WILTSEY, W. J. MONROE and Others, Appellants, and Same Plaintiffs, Appellees, v. ELIZA HANSON and Others, Appellants.

**Actions:** DELAY IN PROSECUTING: DISMISSAL: DISCRETION. Where a testator executed conveyances at the same time he executed his will and they were a part of the same transaction, several years' delay in prosecuting an action to set the conveyances aside on the ground

of mental incapacity, pending a contest of the will on the same ground, was not such laches as to require a dismissal of the action; and where the motion to dismiss was not made until after the filing of a supplemental petition indicating an intention to proceed with the suit, its denial was within the court's discretion.

**Fraudulent conveyances: UNDUE INFLUENCE: EVIDENCE.** While mere solicitation, though urgent, made with the view of securing the execution of a gift or devise of property is not necessarily undue influence, and as a matter of law may not require the setting aside of a will or conveyance thus obtained, yet where such influence is brought to bear upon one whose physical strength is spent and whose mind is shattered by impending dissolution, courts will set aside any advantage thus obtained.

*Appeal from Hamilton District Court.*—HON. CHAS. E. ALBROOK, Judge.

WEDNESDAY, DECEMBER 13, 1911.

ACTIONS in equity to set aside certain conveyances, made by Talman Wiltsey in his lifetime, on the ground of want of mental capacity in the grantor, and that the execution of such conveyances was procured by undue influence. The plaintiffs were adjudged entitled to the relief prayed, and the defendants, or some of them, appeal. Other phases of the controversy between these parties have twice before had the attention of this court. See *Wiltsey's Estate*, 122 Iowa, 430, and *Will of Wiltsey*, 135 Iowa, 430, to which reference is made for an exhibit of such material facts as are not set forth in the following opinion.—*Affirmed.*

*Wesley Martin and D. C. Chase*, for appellants.

*Boyce & Henderson and W. T. Bennett*, for appellees.

WEAVER, J.—The will of Talman Wiltsey was successfully contested on the grounds of mental incapacity and undue influence. See *Wiltsey's Will*, 135 Iowa, 430, and

122 Iowa, 423. The plaintiff's right to share in his estate is derived through Eugene Wiltsey, deceased, who was the acknowledged natural son of Talman Wiltsey. The deeds, the validity of which is attacked in these actions, were made and executed at the same time with the will which has been set aside, as above indicated. In other words, the making of the will and the execution and delivery of the deeds were substantially parts of one and the same transaction, by which Talman Wiltsey, in anticipation of death, undertook to dispose of his estate. The petition in each of the several cases now under examination alleges that the deeds were made without consideration and under undue influence, and at a time when the grantor was of unsound mind. Plaintiff further pleaded the adjudication had in the will contest as conclusive upon the question of the grantor's mental incapacity, and of the fact of undue influence exercised over him.

The defendants admit the making and delivery of the deeds, but deny that the grantor was of unsound mind, or that he was in any manner unduly influenced in making such conveyances. They further allege that the deeds were made upon a good and sufficient consideration therefor, and that, in any event, they should be treated as fully executed gifts to the grantees. They also plead that plaintiffs are estopped by their laches in the prosecution of these actions.

I. Talman Wiltsey died on August 28, 1900. Within thirty days thereafter, Eugene Wiltsey, the natural son above mentioned, instituted a contest of his father's will, and brought the three several actions which have been consolidated for hearing upon this appeal. Quite naturally the parties on either side first concentrated their attention and their energies upon the issues joined in the will contest, pending which neither of them, except as hereinafter stated, demanded trial of the actions to set aside the deeds. The probate proceedings were stubbornly contested at each step, and, as we

1. Actions: delay in prosecuting: dismissal: discretion.

have seen, were twice appealed to this court, with the result that the invalidity of the will was not finally established until the petition for rehearing upon the second appeal was denied, on September 27, 1907. At the September term, 1904, of the district court, defendants having served notice of trial of these cases, they were continued, upon motion of the plaintiffs, because of the absence of witnesses. From that time they remained dormant until February 12, 1909, when plaintiffs filed an amended and supplemental petition, substituting the heirs and representatives of several parties who had died since the beginning of the litigation, and pleading the adjudication in the will contest. This was followed by a motion on part of the defendants to dismiss the actions for want of prosecution. The motion was denied, and the alleged delay or laches in the prosecution of the case was then pleaded by the defendants in answer to the amended petition. Trial upon the merits was finally accomplished in February, 1910, with the result already indicated. The first assignment of error is directed to the refusal of the trial court to dismiss the actions for want of prosecution.

We discover no sufficient ground for holding that the court abused its discretion in denying the motion to dismiss. It is true that this litigation has been so unconscionably prolonged that several of the parties, apparently discouraged over the prospect of its termination, have died, leaving their law suits as a legacy to their heirs; but, so long as the will contest was being waged, there was manifest good reason why neither party should press the other actions to trial. The cases all involved the same issue upon the mental capacity or incapacity of Talman Wiltsey at the date of the will and deeds, and of the alleged undue influence under which these instruments were executed. The same testimony which would have been competent in the one case was equally competent in the other, and if the contest of the will was finally determined in favor of the proponents, there

would have been little or no use in the proceedings to set aside the deeds, made at the same time. This situation seems to have appealed to both parties, and, except as to the one notice of trial, given in the year 1904, the equitable proceedings were permitted to remain in abeyance by the tacit consent of all concerned. The motion to dismiss was not made until after the plaintiffs had filed their supplemental petition, and thus given evidence of their readiness to proceed. Its denial was well within the discretion of the court, and the exception taken thereto by the appellants can not be sustained.

II. We shall not attempt to set out or review the evidence contained in the record concerning the alleged mental incapacity of Talman Wiltsey or the influence al-

2. FRAUDULENT  
CONVEYANCES:  
undue influ-  
ence: evi-  
dence.

leged to have been employed in procuring the deeds here in question. It is enough to say that it is substantially identical with that produced upon the trial of the will case, and held by us sufficient to sustain the verdict in favor of the contestants. That testimony is stated with some degree of detail by the writer of the opinion in the case of *Wiltsey's Will, supra*. The court below held that the finding upon these questions in that contest was not available to the plaintiffs as an adjudication controlling the result upon the issues here presented; and as plaintiffs have not appealed, that ruling will be treated as the law of the case. It may also be conceded, as contended by counsel, that it is entirely competent for this court, while sustaining the verdict of the jury in the former action at law, to reach the opposite conclusion upon the same testimony, when presented to us upon appeal in an equitable action. Acting upon that theory, we have examined the record anew, and discover no ground upon which to interfere with the decree from which some of the defendants have appealed. The grantor was at the date of these papers of advanced age and upon his deathbed; he was evidently very weak, and closely

surrounded by the beneficiaries of the several instruments alleged to have been executed by him. The evidence as a whole convinces us that the old gentleman was reluctant to make these papers, that he realized his own inability to act in such matters, was confused and uncertain in his own mind as to what he could or ought to do, and that he finally yielded to the solicitation of the relatives who surrounded his bed, and were hostile to the claims of the natural son, and that in executing the papers he was registering their will, rather than his own.

It will be admitted that mere solicitation, even though it be urgent, addressed to a person to persuade or induce him to make a gift or devise of his property, is not necessarily undue influence, nor does it, as a matter of law, of itself, afford ground for setting aside a will or deed so obtained; but, when such influences are brought to bear upon a dying man, whose physical strength is spent and whose mind is groping in the shadows of impending dissolution, the courts will not hesitate to set at naught an advantage thus secured. We do not ignore the evidence of numerous distinterested witnesses of unimpeachable character who speak of the general vigor and soundness of the grantor's mind in his old age. There are but few of these, however, who saw or had opportunity to judge of his condition in the very last stages of his life; and of the testimony bearing upon the facts attending his last sickness and leading up to the execution of the deeds, though not without dispute, we think the preponderance is with the plaintiffs. There is no occasion for discussing the authorities cited in support of the appeal. The legal propositions are generally unassailable.

The real conflict in this case is one of fact, and, while the burden of the issue is upon the plaintiffs, we think it has been fairly sustained. The decree of the district court is therefore *affirmed*.

In re Estate of ALMIRON CULVER, Deceased, MELISSA GOULD, Administratrix, Appellant, v. W. W. MORROW, Treasurer, Appellee.

**Collateral inheritance tax: NATURE OF PROCEEDING.** Proceedings relating to collateral inheritance taxes, while special, are at law and the rules applicable to appeals in law cases govern.

**Same: APPEAL: NECESSITY FOR EXCEPTIONS.** It is the general rule that the appellate court will not review a ruling of the lower court to which no exception has been taken; and this is true in equity cases if anything more is involved than the mere question of which party is entitled to recover on the facts and issues involved. So where the lower court after reversal of an inheritance tax proceeding set aside its order and judgment upon a stipulation of the parties to that effect, reserving for further consideration a claim that the tax was excessive, and upon a subsequent hearing reduced the former judgment, an exception to the final order was essential to a review on appeal.

**Same: TRIAL *de novo*.** An inheritance tax proceeding is not triable *de novo*, but is at law and reviewable on exceptions, even though it could not be submitted to a jury.

*Appeal from Pottawattamie District Court.*—HON. O. D. WHEELER, Judge.

WEDNESDAY, DECEMBER 13, 1911.

THIS is an appeal from an order in probate, directing the administratrix to pay to the state treasurer, as a collateral inheritance tax, the sum of \$614.47.—*Affirmed.*

*W. S. Baird*, for appellant.

*George Cosson*, Attorney-General, and *N. J. Lee*, Special Counsel, for appellee.

DEEMER, J.—In December of the year 1907, Melissa Gould was appointed administratrix with will annexed of the estate of Almiron Culver, deceased. The will was probated as a foreign will, and administration here was ancillary. Among other things, the administratrix inventoried "cash on deposit in the State Savings Bank of Council Bluffs, \$10,640.48." Shortly after the probate of the will, the state treasurer filed a claim for an inheritance tax, due the state of Iowa upon the estate, which he valued at the sum of \$15,640.48, making the total tax due \$780.02. The administratrix filed answer to the claim, denying that the claimant was entitled to any tax, and especially asserting that no tax should be assessed upon twenty-five shares of stock in the State Savings Bank of Council Bluffs, valued at \$150 per share. She averred that testator, at the time of his death, was a citizen and resident of Kansas; that principal administration was being had in that state; that the shares of stock referred to were in his possession in the state of Kansas at the time of his death and have since been in the possession of his administratrix in that state; and that the said shares of stock have never been in this state, and are not a part of the estate in this state.

Upon these issues the case was tried to the court upon an agreed statement of facts, from which we extract the following:

Almiron Culver departed this life at Wichita, in the county of Sedgwick, state of Kansas, August 23, 1908, leaving a will disposing of all his property; that at the time of his death Almiron Culver was a resident of Wichita, Kansas, and had been such resident for many years prior thereto; that his will was probated in the county of Sedgwick, Kansas, and Melissa Gould duly appointed administratrix therein, and is now acting as such; that later, said will was duly probated in the district court of Pottawatomie county, Iowa, and Melissa Gould appointed as administratrix, and is now acting as such; that among other property left by the said Almiron Culver at the time of

his decease was the sum of \$10,800.08 in cash, deposited in the State Savings Bank of Council Bluffs, Iowa, where it now remains, and twenty-five shares of stock in such State Savings Bank of Council Bluffs, Iowa, represented by two certificates, one for twenty-four shares and one for one share, which certificates were, at the time of the death of said Almiron Culver, in his possession at Wichita, Kansas, and had been in such possession for many years, and said shares of stock have not, since the decease of said Almiron Culver, been within the jurisdiction of the state of Iowa, and are now in the possession and control of the administratrix in Sedgwick county, Kansas. That the State Savings Bank of Council Bluffs, Iowa, is an Iowa corporation, with its place of business in Council Bluffs, Iowa, and that the par value of such shares of stock is \$100 each; that the fair market value of said stock is and was \$200 each share, making a total of \$5,000 for said twenty-five shares of stock.

Upon this record, the trial court found that the \$10,000 on deposit in the State Savings Bank was subject to the collateral inheritance tax, but that the bank stock was not subject to said tax. Accordingly, judgment was rendered for the amount of the tax on the deposit in the bank, to wit, \$532.02. Both parties excepted. This ruling was had on August 26, 1908. The state treasurer alone appealed to this court, and upon the appeal here it was found that the bank stock was subject to the inheritance tax. The administratrix did not appeal, and the time for her appeal expired on February 26, 1909. The case was heard in this court on the state treasurer's appeal, and an opinion filed on December 15, 1909, reported in 145 Iowa, 1.

On August 11, 1909, and after the time for appeal had passed, the parties filed a stipulation in the district court, from which we extract the following:

Comes now W. W. Morrow, state treasurer, by H. W. Byers, attorney-general of the state of Iowa, and Melissa Gould, administratrix of the estate of Almiron Culver, de-

ceased, by M. A. Hall, her attorney, and stipulates and agrees that the judgment heretofore rendered in this matter by the court, allowing an inheritance tax upon the money on deposit in the Council Bluffs Bank in the sum of \$532.02, may be vacated and set aside, so far only as that or any other specific sum is concerned; and that the adjudication by the court of the amount of such tax shall be made after and when the Supreme Court of the state of Iowa shall have passed upon the question involved in the appeal by the plaintiff herein named from that part of the judgment disallowing a tax upon certain bank stock; this stipulation, and the entry vacating and setting aside the judgment, to be without prejudice in all respects to the rights of the parties thereto in and on account of such appeal now pending in the Supreme Court of the state of Iowa.

Pursuant to said stipulation, an order was entered in the trial court, reading in this wise:

The court does order that that part of the judgment rendered on August 26, 1908, by this court, allowing an inheritance tax upon the money on deposit in the Council Bluffs Bank in the sum of \$532.02, be and the same is hereby vacated and set aside, and that the matter of such tax and the amount thereof shall remain in abeyance, to be determined by the court when and after the Supreme Court of the state of Iowa shall have passed upon the question involved in the appeal by W. W. Morrow, state treasurer, from that part of the judgment disallowing an inheritance tax upon certain bank stock; this order to be without prejudice in all respects to the rights of the parties hereto in and on account of such appeal now pending in the Supreme Court of the state of Iowa by the court.

After the reversal here, and on the 8th day of May, 1910, the state treasurer, through his attorney, made a motion for judgment in the district court in conformity with the opinion here, and the record shows the following proceedings with reference thereto:

Mr. Hess for the plaintiff, W. W. Morrow, state treasurer, offered and read in evidence all the files in the matter

of the estate of Almiron Culver, deceased; including the filings made herein and noted on the appearance and fee docket, also the claim filed by him for collateral inheritance tax, in support of the motion, and at this time the state treasurer, Morrow, objects to the introduction of any testimony on the part of the defendant going to the merits of said claim, for the reason that as to the money in the bank there was a complete adjudication in the order of the court, made herein, August 28, 1908. As to the bank stock on which the claim was based, the right to a tax thereon was fully determined by the Supreme Court, in a decision handed down by them on the — day of —, 19—. The state treasurer, Morrow, therefore demands and asks the court to make an order on the said administratrix to pay to the state of Iowa, or to W. W. Morrow, state treasurer, the following sums: \$782 tax, and interest thereon in the amount of \$99.05, being a total of \$881.05, and asks the court to make an order, requiring the said administratrix to pay said sum forthwith. The administratrix, being represented by W. S. Baird, offered the following: In resistance to the said motion of the state treasurer for an order to be made on the administratrix to pay forthwith the sum of \$881.05, the administratrix at this time offers all the files in the estate of Almiron Culver, deceased, both in the case of Morrow, state treasurer, and in probate. The administratrix also offered and read in evidence Exhibit 2, which is the order vacating a portion of the judgment, and which is above set out.

Thereafter the court below entered an order, reciting the facts hitherto set forth with reference to the previous order, the results of the appeal to this court, and further made these findings:

That thereafter the said administratrix filed an application to modify the judgment of the court, of the date of August 26, 1908, on the ground that the same was excessive in the sum of one hundred and fourteen (\$114) dollars, for the reason that Nettie J. Dickinson, Frank L. Jones, and Earl Jones, children of Fayette Jones, a stepchild of the decedent, were legatees under the will, and that the portion coming to said named children was not subject to the collateral inheritance tax under the laws of the state of

Iowa. That said judgment, for the reason just stated, was excessive in the sum of one hundred and fourteen (\$114) dollars. That thereafter this court made an order, vacating a portion of said judgment, being the portion claimed in said application to be in excess of the sum that should be collected by the state of Iowa; that said order was as follows: [Here follows the vacation order set out at length].

The order of the trial court then proceeds:

That this court finds that it was the intention of the judge, in the order just set out, to set aside and annul only such portion of the judgment of August 26, 1908, as was claimed to be excessive, and that it was the intention in said order to vacate the same only to such extent as the judgment of August 26, 1908, was excessive, by reason of a portion of the property upon which the tax was claimed descending to heirs who were not collateral under the laws of the state of Iowa, and therefore exempt from the collateral inheritance tax. And the court now finds that there should be paid by said administratrix to the said W. W. Morrow, state treasurer, the sum of four hundred eighteen and 2-100 dollars as tax upon moneys, together with interest thereon as provided by law, and the further sum of one hundred ninety-six and 45-100 dollars, together with interest thereon as provided by law, as collateral inheritance tax upon said bank stock. Be it therefore ordered and adjudged by the court that the motion of W. W. Morrow, state treasurer, herein be granted, and that Melissa Gould, administratrix of the estate of Almiron Culver, deceased, be and she is hereby ordered and directed to pay from the moneys now in her hands as such administratrix the sum of six hundred fourteen and 47-100 dollars, together with interest as by law provided as a collateral inheritance tax upon the estate of the said decedent.

It should be stated that Judge Wheeler made all of the orders above referred to, and was fully cognizant of all the proceedings. No exception was taken to any of the orders so made, or to the final order, but on the 12th day of December the administratrix appealed from the final order.

Such is the unusual record in its entirety. It has

seemed necessary to set it out, because of the claim that we have nothing to consider, for the reason that no exceptions were taken, either to the final judgment, or to any of the proceedings leading up to the final order. Section 1481 of the Code reads as follows: "The district court having either principal or ancillary jurisdiction of the settlement of the estate of the decedent shall have jurisdiction to hear and determine all questions in relation to said tax that may arise affecting any devise, legacy or inheritance, or any grant or gift, under this chapter, subject to appeal as in other cases, and the treasurer of state shall, in his name of office, represent the interests of the state in any such proceeding." From this it appears that the proceedings, while special, are at law, and are not equitable in character; and that the rules applicable to appeals in law cases must govern.

Now, the universal rule is that this court will not review upon appeal, a ruling of the lower court to which no exceptions are taken. *Chapman v. Lobey*, 21 Iowa, 300;

*Holten v. Butler*, 22 Iowa, 557; *Appanoose Co. v. Walker*, 23 Iowa, 26; *Redding v. Page*, 52 Iowa, 406; *Spelman v. Gill*, 75 Iowa, 717; *Beason v. Jonason*, 14 Iowa, 399; *Eason v. Gester*, 31 Iowa, 475; *Richards v. Hintrager*, 45 Iowa, 253; *Soup v. Smith*, 26 Iowa, 472; *Aldrich v. Paine*, 106 Iowa, 461; *Gillespie v. Ashford*, 125 Iowa, 729; *Young v. Rann*, 111 Iowa, 253.

The rule does not apply to final decrees in equity cases, or perhaps to any case which is triable *de novo* in this court. But even here, if anything more is involved than the question of which party is entitled to recover upon the facts and issues joined, exceptions must be taken. Code, sections 3749-3751; *Dicken v. Morgan*, 59 Iowa, 157; *Gately v. Kniss*, 64 Iowa, 537; *Powers v. O'Brien Co.*, 54 Iowa, 501; *Hodgin v. Toler*, 70 Iowa, 21; *Fink v. Mohn*,

1. COLLATERAL  
INHERITANCE  
TAX: nature of  
proceeding.

2. SAME: appeal:  
necessity for  
exceptions.

85 Iowa, 739; *Exchange Bank v. Pottorfe*, 96 Iowa, 354; *Payne v. Dicus*, 88 Iowa, 423.

Going to the record, it will be observed that the trial court refused to consider the question as to whether or not the money on deposit in the bank was subject to the collateral inheritance tax, but did take into account the claim, made by the administratrix, that the tax was excessive to the extent of \$114, and upheld this claim, thus reducing the amount of the tax previously assessed from \$532.02 to \$418.02. It was held that this was the only question intended to be reserved by the stipulation for the vacation order and the order entered pursuant to said stipulation. The question as to whether or not the money was taxable in this state was not decided by the trial court, because of the fact that the administratrix did not appeal from the original judgment. The vacation order was held not to apply to anything, save the claim that the tax assessed was excessive; and the court recites that it was entered because of the claim, made by the administratrix after the original judgment was entered, that the tax was excessive. It is apparent that the trial court did not consider the question as to whether or not the money on deposit was, as an original proposition, subject to the collateral inheritance tax. The error, if any, of the trial court, was in its refusing to adjudicate that question, and in refusing to consider the vacation order as conclusive. No testimony was adduced with reference thereto, save as heretofore indicated; and it is apparent, we think, that to secure a review of the final order in this case an exception was necessary. There seems to be some foundation for the court's refusing to consider the vacation order, except in so far as it left the matter open as to the amount of the tax, in the stipulation for the order which we have hitherto set out. It is true that the state treasurer made no motion to rescind the same, and that the court acted upon its own knowledge of the matter, the judge being the same one who granted the vacation

order, and it may be that there was error here. But to get the matter before us on appeal it was necessary to except to the rulings.

The case is not triable *de novo* in this court, but upon exceptions taken; and this is true, although the matter could not be submitted to a jury. The proceedings are at law, and are reviewable as such. Even were this not so, appellant's counsel do not, in their brief, challenge the ruling of the trial court as to the effect of the order of vacation. He devotes his entire argument to the claim that the money was not taxable because of the non-residence of the testator. The trial court did not pass upon that question, holding that it was *res adjudicata*, and no exception was taken to his judgment so finding. At the time the stipulation was filed for the order of vacation, the time for an appeal by the administratrix had expired, and she had evidently elected to rely upon her claim that the amount of the tax was excessive to the extent of \$114. This question she could not present without the consent of the state treasurer; and the trial court found that this consent was simply to open up the case, in so far as the amount of the tax was concerned, and no farther. As we have already said, the appellant does not challenge this finding in the brief filed for her. Her counsel argues a question not passed upon by the trial court on the final hearing, to wit, the issue as to whether or not the money on deposit in the bank was subject to any tax. The case is peculiar, and, were it open for a new trial on the merits, or if the matter were properly before us, we should be inclined to hold that the money deposited in the bank was not taxable. The case seems to be ruled by *Gilbertson v. Oliver*, 129 Iowa, 568; *Morrow v. Gould*, 145 Iowa, 1.

However, counsel for appellant does not seem to have entertained that opinion when the original order and judgment was entered, for he did not appeal therefrom; nor did he rely on the stipulation filed for vacation, for when that

was entered into, the time for taking an appeal had expired. This stipulation was entered into on August 11, 1909, and the time for appeal expired on February 26th of the same year. There seems to have been a claim, however, that the amount of the tax was excessive to the extent of \$114, and the vacation order was doubtless entered in order that this claim might be considered. At least, this is what the trial court found, and no exception is taken to the finding, and it is not now claimed in argument that the trial court was in error. Had the stipulation been entered into or the vacation order entered before the time for an appeal by the administratrix had expired, we would have an entirely different question, although, if that were the fact, it might be incumbent on the administratrix to show that this was the thing which induced her to abandon her right of appeal.

For the reasons pointed out, the judgment must be, and it is, *affirmed*.

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J. H. HENDERSON, Appellant, v. BOARD OF SUPERVISORS OF POLK COUNTY, IOWA, and DRAINAGE DISTRICT NO. 6, POLK COUNTY, IOWA, Appellee.

**Appeal:** NOTICE: SPECIFICATION OF DATE OF JUDGMENT. The notice  
1 of appeal from a single judgment need not specify the date of the judgment, and even if specifying a wrong date it will not defeat the jurisdiction of the appellate court.

**Same:** NOTICE IN DRAINAGE PROCEEDINGS. Notice of appeal need not  
2 be served on the petitioners for a drainage improvement; under the present statute it is sufficient if filed with the auditor, together with a bond duly approved by the auditor.

*Appeal from Polk District Court.*—HON. W. H. McHENRY,  
Judge.

WEDNESDAY, DECEMBER 13, 1911.

APPEAL from an assessment of benefits in a drainage

proceeding. From the order of the board of supervisors the plaintiff appealed to the district court of Polk county. Upon motion of the defendants, the appeal was dismissed for want of jurisdiction. From the order of dismissal entered by the district court, plaintiff has appealed.—*Reversed.*

*Stewart & Hextell*, for appellant.

*John J. Halloran*, for appellees.

EVANS, J.—The order and judgment of dismissal appealed from was entered in the district court on December 18, 1909. This fact is made to appear in the appellant's abstract. The notice of appeal, however, described the judgment as having been entered on September 18, 1909.

The appellee moves to dismiss the appeal here for want of jurisdiction on the ground that no notice of appeal from the judgment of December 18, 1909, was ever served.

No order was, in fact, entered on September 18, 1909, and the specification of such date in the notice of appeal was a mere error, clerical or otherwise. It was not essential to the notice of appeal that any date of the judgment should be specified; there being but one judgment in the case. Nor will a mere mistake in the notice of appeal, specifying the wrong date of the judgment, operate to defeat the jurisdiction of this court. This has been the repeated holding. *Kennedy v. Rosier*, 71 Iowa, 671; *Geyer v. Douglass*, 85 Iowa, 93; *Parker v. Des Moines Ass'n*, 108 Iowa, 117; *Lynch v. Dugan*, 129 Iowa, 243. Appellant has shown great persistence of error as to the date of this judgment. His argument in resistance to the motion to dismiss advises us that the judgment appealed from was entered July 18, 1909.

The ground of dismissal in the district court was that

the plaintiff had failed to serve his notice of appeal upon the petitioners for the drainage improvement. The plaintiff did file a proper notice of appeal with the county auditor together with a bond duly approved by the auditor, all in strict accord with the requirements of section 1989-a6 and section 1989-a14 (Code Supplement). This was a sufficient service. *In re Jenison*, 145 Iowa, 215; *Shaw v. Nelson*, 150 Iowa, 559.

It should be said for the trial court that in entering the order of dismissal it followed the case of *Farley v. Hamilton County*, 120 N. W. 83. A rehearing was granted in the cited case which had the effect to set aside that opinion. The opinion followed *Henderson v. Calhoun County*, 129 Iowa, 119. It was overlooked that the statute had been amended since the *Henderson* case had been decided. That fact was brought to our attention in a petition for rehearing in the *Farley* case, which was promptly sustained. That case was subsequently decided upon its merits. 144 Iowa, 476. For the reasons indicated, the judgment below must be, and it is, *reversed*.

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SARAH M. BOICE v. DES MOINES CITY RAILWAY COMPANY,  
Appellant.

**Street railways: INJURY TO PASSENGER: NEGLIGENCE: EVIDENCE.** In this action for injuries to a passenger while attempting to board a street car, the evidence of negligence on the part of the conductor in signaling the car to start before plaintiff had reached a place of safety; that he stopped plaintiff from entering the car while in a place of danger; and that he was in a position where he might have assisted plaintiff to a place of safety, was such as to require a submission of each charge of negligence and to support a verdict for plaintiff.

**Same: NEGLIGENCE.** The rule that a mere mistake or error of judgment on the part of one required to act in an emergency

will relieve him from the charge of negligence, applies to the conduct of the one who is put in peril and not to one whose duty it is to avoid injury to another. Thus where plaintiff was attempting to board a street car by the passageway intended for egress, and the conductor, who was in no position of peril, told plaintiff to wait a minute while she was on the first step of the car, and after he had signaled the car to start, there was no emergency relieving him from the charge of negligence, if he failed to exercise reasonable care to assist plaintiff to a place of safety.

**Same: REASONABLE CARE: INSTRUCTIONS.** Where the court instructed 3 that the conductor was required to use the highest degree of care consistent with the practical operation of his car to avoid injuring a passenger, but that such degree of care was not required in case the passenger was attempting to board the car in such manner that he was not aware, or in the exercise of reasonable care would not have been aware of his intention to do so, failure to further define the degree of care required in rendering assistance to a passenger when discovered in a place of danger was not prejudicial.

**Same: EVIDENCE: CONCLUSION.** The testimony of plaintiff that if 4 the conductor had not asked her to wait a minute while attempting to board the car she could have reached a place of safety before the car started, was not objectionable as a conclusion, since the conclusion could only be drawn from a knowledge of all the attendant facts and circumstances.

**Evidence: HARMLESS ERROR.** Evidence tending to excite the sympathy 5 of the jury, when not produced for an improper purpose and having no prejudicial effect, is not ground for reversal.

*Appeal from Polk District Court.*—HON. W. H. McHENRY,  
Judge.

THURSDAY, DECEMBER 14, 1911.

ACTION to recover damages for personal injuries received by plaintiff while a passenger on a car of defendant resulting from falling off the platform of said car by reason of the alleged negligence of the conductor in its operation. There was a verdict for plaintiff, and from a judgment in her favor the defendant appeals.—*Affirmed.*

*Guernsey, Parker & Miller and A. G. Rippey, for appellant.*

*Boyd & Bray and Bannister & Cox, for appellee.*

**McCLAIN, J.**—The evidence tended to show that plaintiff attempted to get on board one of defendant's street cars at its stopping place on Walnut street east of Seventh street, in the city of Des Moines, approaching the car from the sidewalk on the south side of the street; and that after reaching the first step of the platform, and while she was in the act of mounting to the second step, the car started in response to the signal of the conductor, and plaintiff was thrown to the pavement, suffering severe injuries. The alleged grounds of negligence which were submitted to the jury were, first, that when plaintiff was mounting the steps of the car, and before sufficient time had elapsed to permit her to reach that part of the car in which passengers were expected to ride, defendant negligently, carelessly, and wrongfully caused the said car to suddenly start forward, throwing plaintiff to the ground; second, that the conductor, seeing the plaintiff on the step of the car and as she was about to enter, stopped the plaintiff and kept her from entering the car before it started, resulting in her being thrown from the car; and, third, that the conductor, when he saw plaintiff on the steps of the car and knew that she was in a position of danger, failed to assist her until she could reach a place of safety.

I. The principal contention for appellant is that there was not sufficient evidence to sustain the verdict of the jury for plaintiff on any one of the three allegations of negligence, and that the court erred as to each of these allegations in submitting it to the jury. We should hardly be justified in discussing in detail the evidence appearing in the record for the purpose of showing that there was

1. STREET RAIL-  
WAYS: injury  
to passenger:  
negligence:  
evidence.

sufficient evidence to go to the jury on each of these allegations of negligence. The general theory of counsel for appellant is that the car was of the "pay as you enter" style of construction, the place for the conductor being about the center of the rear platform beside the passageway for exit, and separated by a rail from the passageway for entrance which occupied the rear portion of the platform; that the plaintiff, while waiting for passengers to dismount, stood beside and close to the body of the car, where she could not be seen by the conductor, instead of approaching the passageway for entrance at the rear end of the car where she could have been seen and might have entered without waiting for the dismounting of the passengers by the passageway for exit; that she stepped upon the car in the passageway for exit, and was not seen by the conductor until the signal for the starting of the car had been given by him standing in his proper position for that purpose; and that, therefore, there was no negligence on the part of the conductor in causing the car to start before plaintiff had reached a place of safety. The difficulty with this proposition is that it ignores the testimony of plaintiff that she went straight across from the sidewalk to the entrance of the car, approaching it to the left of a passenger who was dismounting, and therefore was in plain sight of the conductor if he had been standing in his proper position, and that the car had not started, and she had heard no signal for its starting when she mounted the step. There was plainly a conflict in the evidence as to the position of plaintiff when she attempted to mount the step, and the question as to whether the conductor was negligent in starting the car before plaintiff had reached a place of safety was for the jury.

As to the allegation that the conductor negligently stopped the plaintiff and kept her from entering the car before it started, there was evidence tending to show that while plaintiff was on the first step, having attempted to

enter by the passage intended for egress, the conductor told the plaintiff to stop, and thus prevented her from reaching a place of safety before the car started. Even though plaintiff was attempting to enter the car by the wrong passage, it was negligence on the part of the conductor to cause her to stop there, after he had signaled for the starting of the car, if by doing so, he imperiled plaintiff's safety. There was no evidence tending to show such an emergency as to justify the conductor in stopping the plaintiff in a position of danger, and requiring her to enter by the proper passage.

The evidence is in conflict as to the position of the conductor while plaintiff was attempting to enter the car, but the jury might well have found that, if he was in his proper position and where he testified that he was at the time the car started, he might, in the exercise of reasonable diligence, have assisted or steadied the plaintiff so that she would not have been thrown off as a result of the starting of the car while she was in a position of danger. The court did not err, therefore, in submitting to the jury each of the grounds of negligence above referred to.

II. The refusal of an instruction asked by the defendant to the effect that, if the conductor was confronted by an emergency which required him to act promptly in the discharge of his duties, a mere mistake or error of judgment on his part would not constitute negligence, was not error. This instruction was asked with reference to the alleged negligence of the conductor in calling to plaintiff as she stepped upon the car to "wait a moment." There is nothing in the record to justify the assumption that as a matter of law there was an emergency relieving the conductor from the charge of negligence if he did what a reasonably careful person under such circumstances would not have done. He was in no peril whatever. He had, so far as appears, no duty to perform save that of signaling the car to stop and looking

2. SAME: negli-  
gence.

out for plaintiff's safety, in view of the fact that he had signaled the car to start before she was in a place of safety, and, as counsel contend, before he was aware that she was attempting to enter the car. He did signal the car to stop, and it was stopped within a few feet. We fail to see how any emergency could have justified his act in calling upon plaintiff to wait after she was on the first step, and when another step would have brought her into a position of safety. The question of the conductor's negligence was for the jury, but the rule as to acting in the case of a sudden emergency does not seem to have had any application as bearing upon that question. The rule seems to have been announced rather as applicable to the conduct of a person who is put in peril than to the conduct of one whose duty it is to avoid injury to another. *Bruggeman v. Illinois Central R. Co.*, 147 Iowa, 187; *Barry v. Burlington R. & L. Co.*, 119 Iowa, 62.

III. An instruction given by the court is criticised because it did not more specifically define the degree of care required of the conductor in rendering assistance to the plaintiff when he discovered her in a place of danger. But the court had already instructed the jury that, as to a passenger, the duty of the conductor was to use the highest degree of care and foresight reasonably consistent with the practicable operation of the car in order to prevent injury to a passenger, and that this degree of care was not required if the plaintiff was attempting to get on board the car in such manner that the conductor either was not aware or in the exercise of reasonable care should not have been aware of her intention to do so. In view of these instructions, there was no error prejudicial to the defendant in not repeating the explanation as to the degree of care required of the conductor when he saw the plaintiff in the position of peril.

Other instructions given are criticised only on the ground that there was no evidence of negligence in the re-

3. SAME: reasonable care: instructions.

spects charged as already explained, and no further discussion of that subject seems to be called for.

IV. There are assignments of error in the admission of testimony over defendant's objection. One of these relates to the overruling of an objection to a question asked of plaintiff "whether or not, if the conductor

4. SAME: evidence: conclusion.

had not asked you to stop, you would have had time to get on the car before it started."

While this question did call in a way for a conclusion of the witness, such conclusion was one which could only be drawn from all the attending facts and circumstances as known to plaintiff, and such conclusions may properly be called out on examination subject to cross-examination as to the bearing of the particular facts and circumstances as they appeared to the witness. The rulings as to this question and two or three others of similar character were so plainly within the exercise of a proper discretion on the part of the trial judge that no further discussion of them seems to be required.

V. The daughter of the plaintiff was called as a witness, and in answer to preliminary questions, was allowed to state, over objection, that her husband had been dead four years, and that he was a physician. Counsel for appellant contend that some prejudice to the defendant appears from these rulings, in that they were calculated to excite sympathy on the part of the jury. We are satisfied from the record that the questions were not asked for an improper purpose, and that no error could have resulted from allowing them to be answered.

The judgment is *affirmed*.

MARY E. DRUMMY v. THE MINNEAPOLIS & ST. LOUIS RAILROAD COMPANY, Appellant.

**Railroads: DEPOT PLATFORMS: NEGLIGENCE: EVIDENCE.** A railway  
1 company must anticipate the use of its walks and depot platforms by passengers while waiting for the arrival of trains, and must take reasonable care that they shall not be injured from defects therein while so using them. In the instant case plaintiff was injured by walking off an unrailed platform at night, and it is held that defendant's negligence in failing to have the platform lighted was for the jury.

**Same: CONTRIBUTORY NEGLIGENCE.** In the instant case it is held that  
2 plaintiff was not negligent as a matter of law in using an unlighted platform for a proper purpose.

**Same: STATUTE: EFFECT.** A statute requiring railway companies to  
3 have their stations furnished, heated and lighted for the accommodation of passengers for a stated time before and after the arrival of trains, does not relieve them of the common law duty of using reasonable care for the protection of persons rightfully upon the premises in connection with the transaction of its business.

*Appeal from Palo Alto District Court.*—HON. D. F. COYLE, Judge.

THURSDAY, DECEMBER 14, 1911.

**ACTION** to recover damages for personal injuries due to the negligence of the defendant, received by plaintiff while sustaining toward defendant the relation of passenger. There was a verdict for plaintiff, and from judgment in her favor the defendant appeals.—*Affirmed.*

*W. H. Bremner, Soper & Soper, and Davidson & Burt* (Geo. W. Seevers, of counsel), for appellant.

*Morling & Morling*, for appellee.

McCLAIN, J.—The plaintiff with her husband, traveling from the city of Red Wing, Minn., to their home in Emmetsburg, arrived in Waterville, Minn., on the line of the Great Western Railroad about nine o'clock in the evening, with the intention of taking one of the night trains on the defendant's road from Waterville to Emmetsburg. It appeared that two trains were available to them; one leaving Waterville at 9:52, the other at 10:15. Plaintiff and her husband went from the Great Western station to a hotel for supper, and, leaving the hotel some time after nine o'clock, went to the station of the defendant road, where they arrived a little before 9:30. They found no light in the waiting room, and plaintiff's husband knocked on the window of the office, which was lighted, for the purpose of securing light. There was already one other passenger in the waiting room. A second summons of like character secured a response from the office, and in a few minutes some one came into the waiting room from the office and proceeded to light a lamp on a bracket in one corner. While this lamp was being lighted, the plaintiff, in response to an urgent call of nature, went out of the waiting room to the platform to seek a secluded place for relieving herself. The station building fronted the main track to the west, separated therefrom by a brick platform. At the south end of the station building was a plank platform rising slightly less than an inch to the foot from the brick platform to the loading platform on the east side of the building, where there was a side track for freight cars. Plaintiff proceeded east up the inclined platform, and, looking down at the freight track, thought she saw, as she testified, that there was only a step of six or eight inches down to the ties, and she attempted to step from the platform to the switch track. In the darkness, being deceived as to the distance, she fell to the switch track, receiving severe and

permanent injuries; the height of the platform above the track being about four feet and a half. There was no light outside of the station building, although there was an unlighted lamp at the south end. It is conceded to have been impracticable to maintain a barrier at the place where plaintiff fell for the reason that the platform was used for unloading freight from cars; but there were steps from the south end of this platform to the level of the track, these steps being guarded by railings, and there was a railing along the south side of the platform which ran east and west at the south end of the building. The ground of negligence submitted to the jury was the failure to have the platform from which the plaintiff fell lighted; the absence of railing or barrier being referred to by the court in this connection only as bearing upon the question whether there was negligence in failing to light.

I. The insufficiency of the evidence to show negligence on the part of appellant in failing to have lighted the unguarded portion of the freight platform at the place

where plaintiff fell is the ground principally relied upon for reversal. We think, however, that the question was for the jury. Plaintiff

1. RAILROADS:  
depot plat-  
forms; negli-  
gence: evi-  
dence..

was not required to remain in the waiting room in order to avoid the possibility of being injured on the platforms surrounding the waiting room, evidently intended for the use of persons having business with the defendant. It is not unusual for passengers awaiting the arrival of a train to walk about on the platform adjacent to the station, and we think that it is the duty of a railroad company to anticipate that they will do so and to take reasonable precaution that in doing so, while exercising reasonable care, they shall not be injured. There is nothing in *McDonald v. Chicago & N. W. R. Co.*, 26 Iowa, 124, or *Hiatt v. Des Moines, N. & W. R. Co.*, 96 Iowa, 169, both of which cases are relied upon for appellant, inconsistent with this rule. On the contrary, it is supported by the

great weight of authority in this state and elsewhere. *Carver v. Minneapolis & St. L. R. Co.*, 120 Iowa, 346; *Merryman v. Chicago Great Western R. Co.*, 135 Iowa, 591; *Missouri Pacific R. Co. v. Neiswanger*, 41 Kan. 621, (21 Pac. 582, 13 Am. St. Rep. 304); *Buenemann v. St. Paul, etc., R. Co.*, 32 Minn. 390, (20 N. W. 379); *Louisville, etc., R. Co. v. Treadway*, 143 Ind. 689, (40 N. E. 807, 41 N. E. 794); *McKone v. Michigan Central R. Co.*, 51 Mich. 601, (17 N. W. 74, 47 Am. Rep. 596); *Beard v. Connecticut, etc., R. Co.*, 48 Vt. 101. In *McNaughton v. Illinois Central R. Co.*, 136 Iowa, 177, it appeared affirmatively that every reasonable precaution for the protection of passengers about the station had been taken, and that the injury complained of happened by reason of the voluntary act of the plaintiff in disregarding usual precautions by opening a closed door, and attempting to pass into a dark place from which passengers were excluded.

II. The question as to plaintiff's contributory negligence was properly submitted to the jury. It can not be said as a matter of law that plaintiff was negligent in attempting to step from the freight platform where it was unlighted. The danger in doing so resulted from the negligence of the defendant in failing to provide such lighting as would have disclosed the peril. Plaintiff was not bound to assume that there was a peril not disclosed. Cases are cited for appellant in which, under somewhat similar circumstances, the injured person has been held negligent as a matter of law. *Reed v. Axtell*, 84 Va. 231, (4 S. E. 587); *Missouri, K. & T. R. Co. v. Turley*, 85 Fed. 369, (29 C. C. A. 196). In *Forsyth v. Boston & A. R. Co.*, 103 Mass. 510, no special point seems to have been made of the negligence of defendant in failing to light the platform nor of plaintiff's reasonable reliance on the duty of defendant, to afford some protection against danger. In *Bennett v. New York, N. H. & H. R. Co.*, 57 Conn. 422, (18 Atl. 668), *Chewning v.*

2. SAME: contributory negligence.

*Ensley R. Co.*, 100 Ala. 493, (14 South. 204), and *Houston, E. & W. T. R. Co. v. Grubbs*, 28 Tex. Civ. App., 367, (67 S. W. 519), the familiarity of the injured person with the premises was made the ground of imputing to him negligence in exposing himself to danger, while in the case before us it appears affirmatively that plaintiff had no knowledge whatever of the danger involved in attempting to step from the platform to the freight track. It should also be said that the court of appeals of Indian Territory reached a different conclusion in the case of *Missouri, K. & T. R. Co. v. Turley*, 1 Ind. T. 275, (37 S. W. 52), from that announced by the circuit court of appeals in the case of the same title above cited. It is sufficient to say in general that the views of the courts announced in these cases so far as they support the proposition that under the circumstances of the case before us the plaintiff was conclusively guilty of contributory negligence, are contrary to several of the cases cited in the first division of this opinion and do not meet with our approval. As we think, the question was for the jury, and it was properly submitted to them under appropriate instructions.

III. A statute of Minnesota was pleaded and proven on the trial containing the provision that passenger stations shall be "properly and comfortably furnished, heated, lighted and ventilated, and in such condition open for the reception of passengers for at least one-half hour before and after the arrival of each passenger train." Rev. Laws 1905, section 2028. There was a conflict in the evidence as to whether plaintiff arrived at the station and went upon the platform where she received her injury more than half an hour before the time scheduled for the arrival of the next train on defendant's road, and the court left it to the jury to determine whether as a matter of fact plaintiff arrived within a reasonable time for an intended passenger train to appear; and instructed that, while the statute might be taken into account in determining the

3. SAME: statute:  
effect.

reasonableness of the time, it was not controlling in that respect. This is the construction which has been usually given to such statutes. They impose a specific duty, but they do not relieve the company from its common-law duty of using reasonable care for the protection of passengers and other persons rightfully upon its premises in connection with the transaction of its business. *Shaber v. St. Paul, M. & M. R. Co.*, 28 Minn. 103, (9 N. W. 575); *Gulf, C. & S. F. R. Co. v. Barnett*, 19 Tex. Civ. App., 626, (47 S. W. 1039); *Illinois Central R. Co. v. Laloge*, 113 Ky. 896, (69 S. W. 795, 62 L. R. A. 405). If, under the circumstances, reasonable care for the protection of the plaintiff from injury involved the lighting of the platform at the time when she was injured, it is immaterial that the terms of the statute did not cover the case.

In other respects the instructions of the court are criticised, but, after careful reading, we are satisfied that the objections made to them are without merit. We would not be justified in setting out the instructions at length for the purpose of explaining the nature of the objections and the answers to be found to such objections in the instructions themselves. We have discussed all the questions of law suggested by counsel for appellant which seem to be of any possible general interest.

The judgment is *affirmed*.

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FARMERS AND MERCHANTS BANK, Appellee, v. F. W. DAIKER AND THERESA DAIKER, Appellants.

**Negotiable instruments: MATURITY: WAIVER: EVIDENCE.** A note payable at a fixed date and containing a provision that the payee may at his option declare the full amount due for nonpayment of interest does not become absolutely due for failure to pay interest at its maturity, but the default in that respect may be waived by subsequent acceptance of the delinquent interest. Some affirmative action on the part of the holder showing an inten-

tion to take advantage of the option must be taken to make the provision effective.

In the instant case the evidence is held to show a waiver of the maker's default in payment of interest.

*Appeal from Sac District Court.*—HON. Z. A. CHURCH,  
Judge.

MONDAY, DECEMBER 18, 1911.

ACTION at law upon three promissory notes. At the close of the evidence, a motion by plaintiff for a directed verdict in its favor was sustained, and defendants appeal. The material facts are stated in the opinion.—*Reversed.*

*George W. Bowen and S. M. Elwood*, for appellants.

*E. A. Wissler and Hutchinson & Jacobs*, for appellee.

WEAVER, J.—The notes sued upon are three in number; two of them being each for the principal sum of \$1,000, and the third for the principal sum of \$1,500. They all bear date July 5, 1909, and fall due July 5, 1912. Each provides for interest at the rate of 8 percent, payable annually, and that a failure to pay any of said interest within five days after due shall, at the option of said obligee or his legal representatives, cause the whole note to become due and collectible at once without notice." This action was begun October 8, 1910; the petition alleging that defendants had defaulted in the payment of interest, thereby maturing the plaintiff's demand for recovery of the principal indebtedness. The only issue we have to consider on this appeal is one raised by defendants' plea in abatement. They allege that after the year's installment of interest became due, and before this action was begun, they tendered and paid to plaintiff the full amount of said interest, and at the same time and place they tendered and

offered to pay to the plaintiff the interest, if any, which had accrued upon said installment from the day it became due. They further allege that plaintiff did not elect to exercise its option to declare the notes due for nonpayment of interest, but, on the contrary, accepted the payment of the interest as such, and assured the defendants that they were all right for another year, and that nothing more would be due until the arrival of the next interest period, thereby waiving its right to declare the notes due because of that default.

The evidence tends to show without material dispute that on September 16, 1910, the defendant, F. W. Daiker, inquired of the plaintiff bank about the interest installment which had fallen due in July, and was informed by the cashier that the amount of such interest was \$240. Daiker went out, and, having procured that sum, paid it over the counter to a bank officer, one Parker, who then discovered that a mistake had been made in computation, and said to Daiker that \$40 more was required. Daiker again withdrew, and again returned, bringing the additional \$40 and delivered it to Parker. These payments were indorsed upon the notes as being for interest; but so much of said indorsements as indicated that the money had been received for interest was afterward erased by the cashier, and the amounts were so divided and shifted as to indicate payments generally. As far as appears, no suggestion was there made to the defendant that plaintiff would insist upon exercising its option to declare the notes due, or would demand payment of the principal indebtedness. On the contrary, defendant swears that the money was paid as interest, and that in paying it he said to the cashier: "This will square us for another year." Furthermore, he appears to have feared that, as his payment was of the exact amount due at the end of the interest period, he might be held in default if he did not pay interest on this installment up to September 16th, and therefore offered to pay

whatever sum had thus accrued, but was told: "It is all right for another year." This testimony is not denied. Indeed, in most respects it is corroborated by the bank officers themselves.

The motion for a directed verdict is based upon the proposition that at the time the suit was begun the notes had, as a matter of law, become due by failure of defendants to pay the July installment of interest, and that the evidence was not sufficient to sustain a plea of waiver of plaintiff's right to enforce their collection. This ruling can not be sustained. The notes did not become absolutely due on default in payment of the interest installment. Appellee had the right or "option" to so consider them, and to proceed at once to bring suit upon them, but was under no obligation so to do. It could waive the default and permit the notes to run without payment of any interest until they fell due on July 5, 1912, and the statute of limitations would not begin to run against the principal debt before that date. If, the interest installment being past due, its payment was tendered or offered by the defendant, and plaintiff received and accepted the same as interest, or if, knowing that defendant paid it, understanding that it was being received in satisfaction of the past-due interest, it will be held to have waived the default, and can not thereafter make it a ground for declaring the whole debt due. *Jones v. De Moss*, 151 Iowa, 112; *Watts v. Creighton*, 85 Iowa, 158; *Smalley v. Ranken*, 85 Iowa, 614; *McCarthy v. Benedict* (Neb.), 131 N. W. 598; *Richardson v. Warner* (C. C.), 28 Fed. 343; *Lowenstein v. Phelan*, 17 Neb. 429, 22 N. W. 561.

By the express terms of the contract the right to declare the note due upon default is permissive only, and the principal debt does not mature until the holder of the note takes some advantage of the default, by bringing suit, or by some other unequivocal act. Failing to thus move, and accepting payment of the interest, the option ceases to exist

with the condition upon which alone it could have been exercised. If this be the true rule of law as applicable to contracts of this nature, and we so regard it, the defendant made a clear case on which to go to the jury, if, indeed, it did not call for a directed verdict in his favor.

For the reasons stated, the cause must be remanded for a new trial, and to that end the judgment of the district court is *reversed*.

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J. N. DUNLAP & Co., Appellant, v. STEVE ANDERSON,  
Appellee.

**Evidence: PROOF OF LOCAL CUSTOM.** A local custom among real estate  
1 agents, with reference to assisting each other, can not be proven  
without a showing that the opposite party knew of the custom.

**Brokers: COMMISSIONS: EVIDENCE.** A real estate broker in a com-  
2 mission action may show that defendant made no other objections  
to a contract of sale tendered him than such as were enumerated  
by him at the time of the tender.

**Trial: WITHDRAWAL OF CAUSES OF ACTION.** Counts of a petition which  
3 are unsupported by evidence should be withdrawn from the con-  
sideration of the jury.

**Brokers: INSTRUCTIONS: CONFORMITY TO ISSUES.** Defendant's evi-  
4 dence in this action tended to show an agreement between the  
broker, the purchaser and the owner, that the contract of sale  
should be left with the owner and if his wife would sign or ac-  
cept it it should be regarded a sale, otherwise not; and there  
was contention that the terms of sale were agreed upon when  
the land was listed with the broker. *Held*, that an instruction  
to the effect that if the jury so found the plaintiff could not  
recover was proper as presenting the issue tendered by such  
evidence.

**Same: RATIFICATION.** Where the evidence in a broker's action for  
5 commission was not such as to require an instruction on the  
subject of ratification of the agent's acts, its omission in the  
absence of a request therefor was not erroneous.

*Appeal from Greene District Court.*—HON. F. M. POWERS,  
Judge.

FRIDAY, DECEMBER 15, 1911.

ACTION at law to recover a commission for finding a purchaser for certain real estate belonging to defendant. Trial to a jury, verdict and judgment for defendant, and plaintiff appeals.—*Affirmed.*

*A. D. and R. G. Howard*, for appellant.

*J. A. Henderson and Wilson & Albert*, for appellee.

DEEMER, J.—Plaintiff's petition is in three counts. The first is based upon an agreement to pay plaintiff a commission, the amount not being fixed, recovery being asked for the reasonable value of the service; the second upon an agreement to pay plaintiff the sum of \$172, or \$1 per acre, as commission for selling the land; and the third is a combination of the two claims elaborated to a considerable extent by allegations as to the facts under which the land is claimed to have been listed and the purchaser found. The trial court submitted the third count only, and of this complaint is made. The verdict was for the defendant.

I. For a reversal, plaintiff relies upon many propositions arising out of rulings on the admission and rejection of testimony, the giving and refusal to give certain instructions, and the overruling of his motion for a new trial.

There were several erroneous rulings on the rejection of testimony, but these were cured either by admissions made by defendant, or by the introduction of like testimony from other witnesses, or by the final admis-

1. EVIDENCE:  
proof of local  
custom.

sion of the testimony, and no prejudice resulted to plaintiff from the rulings. Plaintiff sought to show a local custom existing between real estate agents in his community, with reference to assisting each other, without any testimony that defendant knew of such custom. Clearly such testimony was inadmissible under the issues tendered by the pleadings.

He should have been permitted to show that defendant made no other objections to a contract of sale tendered than those enumerated by the defendant when the contract was presented. This was cured by other testimony, however, and plaintiff had the benefit thereof. Although plaintiff was denied the right to show former listing of the lands with him, this matter was fully cured by admissions of the defendant and by other testimony. Certain rulings on the admission of testimony are complained of which need not be specially considered, for the reason that they were made upon questions propounded as cross-examination, or called for relevant and material facts.

II. At the close of the testimony, defendant filed a motion asking the court to withdraw from the jury counts one and two of the petition. This motion was sustained and exception taken. This ruling, as well as the instructions of the court, limiting the issues to the matters tendered by the third count of the petition, are complained of. There was no testimony to support these counts of the petition, and the instructions given covered the real issue in the case as elaborated in the third count. The testimony was evidently directed to this third count, and there was no error in refusing to submit the other two.

III. No exceptions were taken to the instructions at the time of trial, and the only exceptions embodied in the motion for a new trial which we may consider have relation to instructions one and four, which are claimed to be in conflict, and to eleven and one-half as follows: "The court erred in giving said instruction number eleven and one-half for the reason that the same is in direct conflict with the other instructions in the case, in this: that the court told the jury that the plaintiffs were entitled to recover herein if they had shown that the lands were listed with them, and that the plaintiffs had procured a purchaser ready, able,

and willing to purchase said lands; while said instruction number eleven and one-half makes the whole matter depend upon the leaving of the contract at the house of the defendant to be signed by his wife if she should agree. This instruction is in direct conflict with the law inasmuch as the plaintiffs were entitled to recover if they had furnished such a purchaser, and it was immaterial that the wife had refused to sign, as their commission was earned when the purchaser was furnished, and did not in any manner depend upon the signing of the contract by the defendant or his wife;" and to number thirteen because it does not conform to the pleadings or the proof offered in the case. The other exceptions are too general to be noticed. *Tyler v. Bowen*, 124 Iowa, 452; *Rule v. McGregor*, 115 Iowa, 323, and cases cited.

Instruction one stated the issues as we think correctly, and instruction four is not in conflict, but in exact harmony therewith.

Instruction eleven and one-half reads as follows: "If you find that Anderson, Wiggins, and Dunlop agreed that the contract should be left with Anderson, and if Anderson's wife would sign it he would accept it, and that his wife refused to sign it, then it would not bind Anderson, and plaintiffs can not recover." The instruction was in accord with some of the testimony introduced by the defendant, and was intended to cover that feature of the case. Standing alone and considered without reference to the testimony, it would seem to be in conflict with other instructions. But construed as it must be, in the light of the testimony, it was the method which the court adopted of presenting defendant's version or one of his claims as to nature of the transaction. He contended that, after some contention between him, the plaintiff, and Wiggins, the purchaser of the land, it was finally agreed between them that the contract should be left with Anderson, and, if his wife would sign or accept it, it

4. BROKERS:  
instructions:  
conformity  
to issues.

should be regarded as a sale, otherwise the whole matter was to be abandoned. It is nowhere asserted that the exact terms of the sale were agreed upon at the time the land was listed, and, when the contract for the sale to Wiggins was presented to defendant, he refused to accept it and finally agreed to the terms upon condition that his wife would sign. This was disputed by the plaintiff, but the issue thus tendered was for a jury, and under the facts disclosed there was no error in the instruction, and no real conflict between the rule thus stated and the other instructions. If the jury failed to find that there was such an agreement between plaintiff and defendant, and the purchaser, Wiggins, as was referred to in the instruction, plaintiff was not entitled to recover unless he proved the allegations of the petition, but, if it found there was such a contract, then plaintiff was manifestly not entitled to recover. The instruction might perhaps have been better framed, but, taken in connection with the testimony in the case, there was no prejudicial error. Instruction thirteen is in accord with the testimony, and states that plaintiff, if entitled to recover at all, was limited to the sum of \$172, with interest, that being the sum which plaintiff's testimony tended to show was agreed upon between the parties in the final negotiations as to the reasonable value of plaintiff's services.

IV. It is contended that the trial court was in error in not instructing upon the question of ratification of plaintiff's acts in attempting as agent to find a purchaser for the land. No such instruction was asked, and the testimony was not such as to call for an instruction upon the subject, in the absence of a specific request. True, ratification did not have to be pleaded, but there must have been testimony of ratification to justify an instruction upon the subject. No proper exception was taken to the refusal of the court to give the only instruction asked by plaintiff. The testimony with

5. SAME.  
ratification.

reference to every material issue was in sharp conflict, and we can not say that the verdict is without sufficient support. Until the parties got together with the proposed purchaser, there was nothing done which to our minds would justify a verdict for the plaintiff. True, there was talk about selling defendant's land, but the terms were not fixed, and nothing was said about a commission. When the matter of terms was brought to defendant's notice and the question arose as to a commission, the trouble began. Plaintiff has one version of what then occurred, and the defendant another, and the disposition of the case finally turns upon what was then said and done. Defendant's theory was presented by instruction eleven and one-half already quoted, while plaintiff insists that no such conditions were made, and that it is no excuse for defendant that his wife would not sign the contract. In support of our conclusion that no contract to pay a commission was made when the original talk was had regarding the sale of the land, see *Welch v. Collenbaugh*, 150 Iowa, 692.

The verdict has such support in the testimony that we can not interfere. The judgment must be, and it is, *affirmed*.

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C. V. JOHNSON, Appellant, v. THE CITY OF SHENANDOAH,  
FLORA M. PERKINS and J. W. PERKINS, Appellees.

**Municipal corporations: ADVERSE POSSESSION: APPLICATION OF DOCTRINE.** The doctrine of adverse possession can not be invoked against the state or any of its instrumentalities so as to prevent the exercise of proper governmental functions; although the doctrine will operate in favor of a municipality and give it title or right to the use of ground as a street or alley.

**Same: ACQUIESCENCE: BOUNDARIES.** The boundaries of streets and alleys as between the public and private owners can not be established by acquiescence; but the intervention of a street or alley between the premises of private owners does not affect the question of acquiescence as between them.

**Same: BOUNDARIES: ESTOPPEL**  
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*Appeal from Sh*

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**SUIT in equity**  
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defendants Perkins are the owners of lots in a block in what is known as Crippen's addition to the defendant city; plaintiff owning lot 153, which faces north on University avenue, and, according to the plat, is fifty feet wide and one hundred and twenty-five feet long, and defendants owning lots 154, 155 and 156, in the same block, which lots face the west, are each one hundred and thirty-two feet in length according to the plat, and forty-one and two-thirds feet in width. The plat shows an alley eighteen feet in width running north and south from University avenue on the north to an eighteen-foot alley on the south running east and west through the block one hundred and twenty-five feet from University avenue. According to the plat, this alley runs along the west side of plaintiff's lot, and on the east side of the rear ends of the lots owned by the defendant Perkins. There is a corresponding alley running through the block north of University avenue and just north of the one in which the lots in controversy are located, which has long been open to the public. Crippen's addition, in which the alley and the lots in question are located, was laid out by a plat regularly made and filed for record in April of the year 1873, and all the lots were sold by Crippen to one Dennison, trustee, in September of the year 1874. Dennison, trustee, sold and conveyed the lot claimed by plaintiff to Mattie M. Bailey in April of the year 1883. Mrs. Bailey sold the lot now owned by plaintiff to one Spaht in December of the year 1898. Spaht sold to Wilson in April of the year 1900. Wilson sold to Luidquist in the year 1902, and in 1904 Luidquist sold to plaintiff. In 1875 Dennison, trustee, sold the lots owned by defendant Perkins to Hurt; Hurt conveyed to Meyers in October of the year 1875; Meyers sold to Walrod in 1876; Walrod conveyed to Meyers in April of the year 1878; and Meyers sold to Mattie M. Bailey in August of the year 1876. These lots Nos. 154, 155 and 156, were owned and occupied by Mrs. Bailey until June of the year 1902, when

she sold to one William Orr, and Orr owned them until June 20, 1906, when he sold to defendant Flora M. Perkins, who now owns the same.

The description given in the several deeds was of the lots by number, according to the plat of the addition. It will thus be seen that Mattie M. Bailey owned lot 153 from 1883 to the year 1898, and lots 154, 155 and 156 from 1876 to 1902. In other words, she owned all the lots from 1883 to 1898. Lots 154, 155 and 156 were inclosed by a fence when Mrs. Bailey purchased them, and this fence was on the west side of the alley where plaintiff now claims it should be. When Mrs. Bailey purchased lot 153, it was uninclosed, and she proposed, after obtaining the title, to close the alley; but the owner of lot 152 immediately adjoining lot 153 on the east objected to closing the same, and Mrs. Bailey through her husband, ran a fence along the west side of lot 153 in such a manner as to leave an alley eighteen feet in width between this fence and the one on the east ends of lots 154, 155, and 156. There were also some trees put out along what was apparently the east side of the alley running alongside of and to the west of lot 153. The former owners of lots 154, 155, and 156 built a barn at the southeast corner thereof, facing the east on the alley in question, and this was evidently built with the thought that it was upon the rear or east end of the lots, for a fence was immediately constructed from the northeast corner of this barn directly north to University avenue. When the fence was put in on the west side of lot 153, something like eighteen or twenty feet was left for an alley between that lot and the rear ends of lots 154, 155 and 156. In the year 1897 Mrs. Bailey, through her husband, built a small buggy shed on the southwest corner of lot 153, facing the alley on the west, and this shed ran over to the line now claimed by plaintiff. From the northwest corner of this shed a fence was erected along what is now claimed to be the line of the

alley northward to University avenue. This fence was just west of the trees which had theretofore been set out. Mr. Bailey, the husband of Mattie M. Bailey, the party who erected the fence on the west side of lot 153, testified that it was put in so that he might use the lot for a garden, but he also said that the alleyway between the lots was always left open for from fifteen to eighteen feet, and that it was used as such by parties who had occasion to pass that way. This is also verified by other disinterested witnesses. On cross-examination Bailey testified: "The barn on lot 153 on the southwest corner was built without reference to special lines. I didn't put it there as a boundary line, only to inclose the lot I owned. Didn't know whether it was the boundary line. Didn't recognize it as the boundary line. Don't know whether Mrs. Meyers or a squirrel planted those walnut trees. Don't think I ever represented to anybody that that fence was the boundary line. I think I have told J. W. Perkins it was not the boundary line. The barn on lots 154, 155 and 156 in the southeast corner was there when I purchased the lots and supposed to be on the line, but couldn't say that it was. Yes, sir; lived on these premises practically all the time I lived in Shenandoah."

The house which is now on lot 153 was erected in the year 1898 or 1899 by one Spaht while he owned the property, and he testified:

Built a house on it, and raised up the lot a little bit. Built the same house that is on the lot now, dwelling house; graded the lot some. I took the grading off the southeast corner, and pulled it around on the west and north, as it was low there. I graded it up to that row of trees on the west side there, walnut trees. The west line of that lot 153 as I was informed and believed was there was walnut trees and kind of an old fence like in with the trees on the west side. Pretty hard to tell now. Wire was put on the trees and post and a few slats. The fence extended clear through to the south alley. The lot was bounded on

the north by University avenue. Extended from that to the east and west alley. There was a coalhouse on that lot. We used it for a buggy shed. It was even with the fence on the west side. The fence was located right along those trees as near as I can remember. Don't know just where, but thought it was right along those trees. Just west of this line I have described as the west line of lot 153 was an alley used by the public. The boundary on the west side

ley as marked out by these fences and improvements corresponded with the plat; but, when the city in that year came to improve University avenue by putting in a curb and gutter, it found that according to the plat the alley was something like nine and one-half feet over upon lots 154, 155 and 156, and that the same number of feet had been added to lot 153 on the west, and it so turned the curb as to provide for an alley according to the plat, and in August or September of the year 1909 the defendants Perkins set a row of fence posts in the center of the alley, preparatory to removing the fence theretofore existing, and to either fence up one-half the alley or compel the plaintiff to remove his fence, sheds, trees, and other improvements nine and one-half feet to the east. If this removal is compelled, the walls of plaintiff's house will be within a few inches of the east line of the alley, and the eaves thereof will extend from four to six inches over and into the alley. Until the making of the improvement in the street, the city had never claimed that the alley as actually fenced and used was not in the proper place. It never made any objection to any of the improvements made upon any of the lots, but apparently stood by and allowed them to be made without protest. The alley through the block just north of the one in which the alley in controversy is located was laid out on the ground exactly in line with the one in question, and the city recognized it as being on the true line. At one time the city put in sidewalk crossings and drains for both of these alleys on the north and south sides of University avenue, and these crossings were laid according to the lot and alley lines as designated by the fences and improvements, and, as already indicated, nobody made any question as to the true lines until the city made the turns in the curbing for these particular alleys. Even at that time the defendants Perkins made no claims in hostility to the plaintiff. They did nothing until the year 1909, when they started to erect the new fence and set

the posts in the center of the alley as it had theretofore been used. It should be stated in this connection that this suit was brought in May of the year 1909. Now, whilst it must be conceded that the law applicable to such a state of facts as here appears has been in much confusion, recent decisions have set at rest many propositions which have been the subject of debate and of apparently conflicting decisions.

mental law sustained by the following, among other cases: *Sherman v. Hastings*, 81 Iowa, 372; *Shea v. Ottumwa*, 67 Iowa, 39; *Getchell v. Benedict*, 57 Iowa, 121; *Bell v. Burlington*, 68 Iowa, 296; *Wilson v. Sexon*, 27 Iowa, 15; *Gerberling v. Wunnenberg*, 51 Iowa, 125; *Duncombe v. Powers*, 75 Iowa, 185; *Dodge v. Hart*, 113 Iowa, 685; *Brown v. Peck*, 125 Iowa, 624; *Hanger v. City*, 109 Iowa, 480. In so far as the city is concerned, the alley as marked out by the fences, buildings, trees, and other improvements is the one to which it is entitled, although there may be some question of plaintiff's right to compel it to accept this alley rather than the one marked out on the plat under any of the rules so far announced.

Again, we are now committed to the proposition that the lines and boundaries of highways, streets, and alleys between the public and private owners can not be established by acquiescence for the reason, among  
 2. SAME: acquiescence: boundaries: others, that no one is authorized to represent the state or its instrumentalities in making any such agreements or to acquiescence in a given line. *Quinn v. Baage*, 138 Iowa, 426; *Weikamp v. Jungers*, 150 Iowa, 292. But in the same connection it has been held that in controversies between private owners regarding their lines and boundaries the intervention of a highway between their premises has no effect upon the doctrine of acquiescence. *Quinn v. Baage, supra*; *Buch v. Flanders*, 119 Iowa, 164; *Klinkefus v. Vanmeter*, 122 Iowa, 412. In so far then as this controversy is over the boundary lines of plaintiff's and defendants Perkins' property, the doctrine of acquiescence does apply, and under the rule announced in *Miller v. Mills Co.*, 111 Iowa, 654; *Laughlin v. Francis*, 129 Iowa, 62, and other like cases too numerous to be cited, plaintiff would undoubtedly be entitled to a decree enjoining the erection of the fence in the center of the alley.

Although plaintiff can not have an injunction against

the city because of adverse possession or by reason of acquiescence in the lines marked out by the fences, he may under all the decisions rely upon an estoppel

3. SAME: boundaries: on the part of the city to claim that the alley  
estoppel. is at any other place than where the parties owning abutting property acknowledged it to be. This doctrine of equitable estoppel is, or may be, based upon the erection of valuable and permanent improvements with reference to the lines marked out and claimed by abutting owners who would be greatly injured were they compelled to remove such improvements. See the following cases: *Uptagraff v. Smith*, 106 Iowa, 385; *Incorporated Town of Cambridge v. Cook*, 97 Iowa, 599; *Johnson v. Burlington*, 95 Iowa, 197; *Bell v. Burlington*, 68 Iowa, 296; *Davenport v. Boyd*, 109 Iowa, 248; *Eldora v. Edgington*, 130 Iowa, 151; *Corey v. Ft. Dodge*, 118 Iowa, 742; *Blennerhassett v. Forest City*, 117 Iowa, 680; *Duetzmann v. Kuntze*, 147 Iowa, 158; *Quinn v. Baage*, 138 Iowa, 438. We have held in this connection, however, that the mere setting out or growing of trees or the erection of fences, or the use of a street for agricultural purposes, will not be sufficient upon which to predicate an estoppel, but have always held that the erection of buildings or the making of other permanent improvements will be sufficient basis for an estoppel *in pais*. *Bradley v. Appanoose Co.*, 106 Iowa, 105; *Burroughs v. City*, 134 Iowa, 429; *Quinton v. Burton*, 61 Iowa, 471.

Now the evidence in this case shows that permanent improvements were made upon lot 153 with reference to the line marked out by the fence, the row of trees, and the buggy shed upon the lot. Both the house and shed were erected, and the lot was improved with reference to that line. All this was without any objection from either the city or the owner of lots 154, 155 and 156. If the alley is now to be opened with reference to the lines shown by the plat, the eaves of plaintiff's house will extend over and

upon the space left for the alley. Plaintiff will be compelled to remove his fence, cut down his trees, and remove his buggy shed, and doubtless do something to support the walls of his house, for they will be within a few inches of the alley. All of this because of a claimed mistake made many years ago in laying out the alley upon the ground. The case differs from many of those relied upon by counsel for appellee, in that the alley, if confirmed where it now is, will be of the full width described in the plat. The city and the public, as well as the individual property owners in the block, will have an alley practically at the place indicated upon the plat, and fully eighteen feet in width. The public suffers nothing save perhaps in the fact that the lines of this alley may not in view of recent developments correspond with those in the alley immediately to the north. But this is an inconsequential matter, for the reason that, as originally laid out upon the ground and used, they did coincide, and, if they do not now, it is due to no fault of the plaintiff. Esthetically it may be desirable to have the streets and alleys in a city uniform in width, course, and direction; but desire for beauty can not be made controlling.

Reduced to its final analysis, the question is really between the adjoining property owners, the city being indifferent as to the result. Defendants, Perkins, are seeking to add something like nine and one-half feet to the rear of their lots, and plaintiff is expected to give up a like amount from the lot inclosed and improved by him. The city in any event has an alley full eighteen feet in width and at approximately the place called for by the plat. Were this simply an attempt on plaintiff's part to claim part of the alley, and there had been no estoppel in the case, a different result might be looked for. As it is, there is little doubt in our minds that the decree should have been in plaintiff's favor, and it is so ordered.

The decree will be reversed and the cause remanded

for one in harmony with this opinion.—*Reversed and remanded.*

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W. H. FALLON, v. JOHN W. AMOND, Appellant.

**Statute of frauds: ORAL CONTRACT: PART PERFORMANCE.** An oral contract creating an interest in land which has been partly performed is not within the statute of frauds but may be enforced. In this action the alleged oral contract permitting the construction of a tile drain across plaintiff's land to drain the land of defendant, in which the evidence tended to show part performance by the laying of tile in plaintiff's land, was not within the statute of frauds.

**Same.** An oral contract creating an interest in land is not rendered absolutely void by the statute of frauds, but the statute relates to the question of proof, which is ordinarily one of law; and especially where there has been a part performance.

**Drainage: CONTRACT: CONSIDERATION.** Where by agreement defendant was permitted to construct a drain over plaintiff's land, on condition that he would lay tile of sufficient capacity to drain the surface water from both farms, a burden was imposed on plaintiff's land and defendant derived a benefit, either of which afforded a sufficient consideration to support the contract.

**Same: BREACH OF CONTRACT: MEASURE OF DAMAGES: PLEADINGS.** Where the plaintiff in an action for breach of a drainage contract claimed the difference in value of the land with and without the improvement as agreed, he was entitled to prove the cost of completing the ditch through his land, as bearing on the measure of damages, without specially alleging such cost. But permission to file an amendment alleging such cost was not an abuse of discretion and resulted in no prejudice, especially in view of the court's instruction that recovery could not be had for more than the cost of the improvement.

**Same: MEASURE OF DAMAGES.** Where the contract for the construction of a drainage ditch called for the permanent improvement of plaintiff's land, and involved a large expense, the measure of damages for breach of the contract was the difference in value of plaintiff's land with and without the improvement.

**Appeal: FILING OF AMENDED ABSTRACT.** Where no prejudice arose from failure of the appellee to file his amended abstract within the time prescribed, but he did so sometime before the cause was for

submission, and the same was in part at least necessary, appellant's motion to strike the same should be overruled.

Evans, J., dissenting.

*Appeal from Webster District Court.*—HON. C. G. LEE,  
Judge.

MONDAY, DECEMBER 18, 1911.

ACTION to recover damages for breach of contract. There was a verdict and judgment for the plaintiff. The defendant appeals.—*Affirmed.*

*B. J. Price and Mitchell & Fitzpatrick*, for appellant.

*Healy & Healy and Kelleher & O'Connor*, for appellee.

SHERWIN, C. J.—The parties to this action are adjoining landowners; the plaintiff owning the S. W.  $\frac{1}{4}$  of section 3, and the defendant the S. E.  $\frac{1}{4}$  and the N.  $\frac{1}{2}$  of section 4. One A. C. Schultze owns the N. E.  $\frac{1}{4}$  of section 5 and the S. W.  $\frac{1}{4}$  of section 33, which lies immediately north of the defendant's N. W.  $\frac{1}{4}$  of section 4. In the early part of 1905, the parties entered into an agreement, whereby they were to construct an open ditch across a part of the defendant's land down to and across the quarter section owned by the plaintiff, and pursuant to this agreement they bought a ditching machine and constructed the ditch; the ditch being about eight feet wide at the top and about four feet deep. There was evidence tending to show that this ditch did not drain the defendant's land in a satisfactory manner, or as he had supposed it would; and the plaintiff alleges that upon making this discovery an oral agreement was entered into between them, "by virtue of which this plaintiff agreed that the defendant might drain his land through tile connected with a certain ditch located through plaintiff's said property, and

extend the tile of said defendant through and into plaintiff's land to a sufficient distance to obtain an outlet, on condition that said defendant should construct and build and lay through plaintiff's farm tile sufficiently large to take the surface water thus thrown by the defendant upon plaintiff's farm and the surface water from the plaintiff's farm." It was further alleged that as a part of said

under the statute and the authorities cited. The plaintiff pleaded a part performance of the contract, and the defendant pleaded that the contract was within the statute of frauds, and therefore unenforceable. The trial court gave no instruction on the subject, and of this the appellant complains.

An oral contract of this kind is not itself void under the statute. The statute only provides that no evidence shall be competent, unless it be in writing. Ordinarily the question

whether a contract may be proved by parol  
 2. SAME. is a question of law to be settled by the court. Here it was conclusively shown that the defendant had laid tile in the ditch for a hundred feet or more on the plaintiff's land, and that it was so laid in pursuance of the alleged contract. Under such circumstances, it was for the court to determine whether evidence of the oral contract was admissible, and the question could not be submitted to the jury without error.

The appellant contends, also, that no consideration for the contract is shown. In this we think he is mistaken. The evidence tended to show that the contract gave the defendant an outlet for his water that he  
 3. DRAINAGE:  
 contract:  
 consideration. did not then have, and that the outlet on the plaintiff's land increased plaintiff's burden. Either is a sufficient consideration for the contract. *Carraher v. Allen*, 112 Iowa, 168.

Complaint is made because the plaintiff was permitted to amend his petition during the trial, alleging the cost of tiling the ditch through the plaintiff's land. The measure of recovery sought was the difference between the value of the land with and without the tile in the ditch; and we are  
 4. SAME: breach  
 of contract:  
 measure of  
 damages:  
 pleadings. of the opinion that the amendment was not necessary to enable the plaintiff to prove such cost as bearing on the measure of damages claimed. But, in any event, no prejudice is shown to have resulted from the

amendment; for the trial court instructed that recovery could not be had for more than the cost of the improvement. We think there was no abuse of discretion in allowing the amendment.

The appellant argues that the plaintiff's measure of damages is the cost of tiling the ditch in accordance with the contract, and not the difference in value of the farm with and without the improvements, and that

fore the case was for submission, and about a month before appellant's argument was filed. No prejudice appears from the delay, and it was in part, at least, necessary. The motion is therefore overruled. The appellant's motion to strike a part of the appellee's argument, because not in the form required by the rules, is overruled. The appellee's motion to strike parts of the appellant's reply argument, because points are therein presented which were not presented in the original argument, is overruled. The reply seems to be a proper response to the appellee's argument on the same points. We find no error for which there should be a reversal, and the judgment is therefore *affirmed*.

EVANS, J. (dissenting).—Upon the whole record, I am unable to see any basis of liability in this case. In the first instance, the parties entered into an agreement about which there is no dispute, whereby they constructed an open ditch through the lands of both, and whereby each paid the expense of the construction upon his own premises. In the bottom of such ditch, defendant laid a tile drain and extended it one hundred feet beyond the partition line. It is now claimed by the plaintiff that this was done under an arrangement, whereby a tile drain was to be laid along the course of the ditch clear across plaintiff's land. He also contends in his testimony that the expense of such tile drain was to be borne in "proportion" to the benefits, and that such proportion would require defendant to pay five-sixths of the cost and the plaintiff one-sixth thereof. The jury awarded plaintiff a verdict of \$2,390, on the theory that this would be five-sixths of the cost of laying a twenty-two inch tile across plaintiff's land. Judgment was entered on the verdict for such amount. And yet plaintiff has not constructed such tile drain; nor is he intending to do so; nor has he expended a dollar upon such enterprise. The position of the plaintiff in the case is

thoroughly inconsistent. He bases his claim that in the proposed carrying out of the enterprise the defendant should be charged with five-sixths of the cost and himself with one-sixth, on the theory that the tile drain would benefit him only to that extent. On the other hand, he bases his claim to a measure of damage of *five-sixths* of the estimated cost of laying such tile drain, on the theory that the failure to lay the same damaged him that much. If the construction of the tile drain could only benefit him *one* dollar, how could the failure to construct it damage him *five* dollars?

For the purpose of determining the "proportion" as between him and the defendant, he introduced evidence to the effect that he would receive only one-sixth of the benefit. Thereupon, on the measure of damage, he introduced evidence to the effect that the construction of the ditch would have benefited him *five times* such amount, and that the failure to construct the same therefore damaged him five times such amount. According to the finding of the jury, the defendant himself would have been benefited \$2,390 by the construction of such tile drain across plaintiff's land. Because of the failure to construct such drain, the defendant must not only necessarily lose such benefit, but he is required by the verdict to pay the amount thereof to the plaintiff. The incongruity of the case may be further illustrated by the suggestion that, if a public drain were now established along the same course by statutory proceedings, the parties would be subjected to assessment of benefits therefor, and the defendant would be liable to pay again five-sixths of such benefits. Plaintiff's case is so inconsistent and incongruous as a whole that the result presents, to my mind, a clear case of miscarriage of justice.

I think the verdict ought to have been set aside.

D. H. GUTH v. A. B. BELL, Appellant.

**New trial: AMENDMENT OF PETITION.** An amendment to a petition  
1 for a new trial may be made after the time for filing the petition has expired, provided no new grounds for a new trial are set up. In this case the allegations of the petition were insufficient to authorize a new trial on the ground of newly discovered evidence, but did in effect allege that a new witness could be produced, and an amendment more clearly negating lack of negligence in discovering the witness was properly allowed, though filed after the year for filing the petition had expired.

**New trial: NEWLY DISCOVERED EVIDENCE: MATERIALITY.** In this ac-  
2 tion for the value of hogs purchased of plaintiff the defendant alleged a breach of warranty on the part of plaintiff to the effect that the hogs were not unloaded while in transit, which plaintiff testified to on the trial, and defendant undertook to show that they had been so unloaded and that he told plaintiff that he would not buy them if they had been unloaded at a certain yard, for fear that they had contracted cholera. *Held*, that newly discovered evidence of the trainmaster that the hogs were unloaded at the designated intermediate yard, and the evidence given by plaintiff in another action between other parties contradicting his evidence in this case on the subject, was material on the question of breach of the warranty, regardless of whether the answer sufficiently raised that question.

**New trial: NEWLY DISCOVERED EVIDENCE: MATERIALITY.** In this action  
3 the defendant filed a petition for new trial on the ground of newly discovered evidence, consisting of evidence inconsistent with that of plaintiff given at the trial and his evidence on the same subject in another action between himself and other defendants in this, that in this action he stated that the hogs in question were shipped in a car with other fat hogs to be sold at an intermediate market, and that after the fat hogs were unloaded at that market the car was taken to a point outside the stockyards and the hogs intended for defendant were loaded directly from the car into another car in which they were delivered to defendant. In the other action plaintiff testified that after the fat hogs were removed from the car he knew nothing about what was done with the car and was not present when the defendant's hogs were transferred to the car in which they were carried to their des-

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tination. *Held*, that plaintiff's evidence in the two cases was entirely inconsistent, making his evidence in the later action newly discovered evidence on the question of whether the hogs were unloaded at the intermediate point.

**Same:** FALSE TESTIMONY. That a judgment was procured by false  
4 testimony is not ground for the granting of a new trial upon petition filed within one year: So that plaintiff's testimony in the suit with other parties, showing that his evidence in this case was false if the other was true, did not support the petition for new trial.

**Same:** NEWLY DISCOVERED EVIDENCE. Newly discovered evidence is  
5 ground for a new trial which may be presented by petition filed within one year; and such evidence may consist of admissions of the party made against his interest and discovered subsequent to the trial, whether made before or after the trial, provided they were made before the expiration of the time for filing a petition for new trial.

**Same.** The records of the stockyards offered in support of the peti-  
6 tion for a new trial, showing that the hogs in question were unloaded at the intermediate station into a certain pen in the yards and reloaded into another car from the same pen, was material and competent evidence tending to contradict the testimony of plaintiff that they were not unloaded at that place, which would be available to the defendant on a retrial of the case, and was sufficient as newly discovered evidence to sustain the petition.

**Same:** DILIGENCE. On the question of diligence in procuring the  
7 evidence, plaintiff's testimony that he saw the custodian of the stockyards records prior to the trial and was told by him that he had no recollection of the transaction, and that plaintiff did not learn of the existence of the records until after the trial of another case involving the same, was a sufficient showing of diligence.

**Same:** CUMULATIVE EVIDENCE. The evidence afforded by the stock-  
8 yards records of the unloading of the hogs was of a different kind and of a distinctively different probative character from that of a salesman of the commission firm who handled the fat hogs, who testified that the hogs in question were unloaded at the yards, and was not cumulative merely: So that refusal to grant the petition for new trial because of the cumulative character of the evidence was erroneous.

*Appeal from Ida District Court.*—HON. F. M. POWERS,  
Judge.

MONDAY, DECEMBER 18, 1911.

THIS is a proceeding commenced by petition for a new trial, filed within one year after rendition of judgment against the defendant; the alleged grounds for new trial being that the testimony of plaintiff as a witness was false and untrue to his knowledge, as shown by his subsequent testimony in another case, and the discovery of new evidence which, if produced on the trial, would have tended to contradict the testimony of plaintiff as then given. The court, on motion, struck out an amendment to the petition for new trial, on the ground that it was filed more than one year after the rendition of judgment, and refused to grant plaintiff any relief under the petition for the reason stated, that the newly discovered evidence was cumulative. The defendant appeals.—*Reversed*.

*Johnston Bros.*, for appellant.

*J. C. Walter*, for appellee.

MCCLAIN, J.—On the trial of the action in 1907, judgment was rendered for the plaintiff for the selling price of a car load of stock hogs delivered to defendant in 1902. The defense interposed on the trial was breach of warranty that, first, the hogs were not afflicted with the disease known as hog cholera; and, second, that said hogs had not been unloaded from the time they were shipped from South Dakota until they were unloaded at Ida Grove; the result of the breach of warranty being that the hogs were of no value on account of their diseased condition when delivered.

From the averments of the petition for new trial and the evidence offered in support thereof, it appeared that soon after the rendition of judgment in this case, in another case brought by this plaintiff against other defendants to recover the purchase price of other hogs delivered

at the same time, and a part of the same shipment, wherein the same defenses were interposed, plaintiff's testimony as to the transfer of the hogs from the cars of the Chicago, Milwaukee & St. Paul Railway Company to the cars of the Chicago & Northwestern Railway Company, at Sioux City, in the course of their transportation from South Dakota to Ida Grove, was materially different from that given by him on the trial of this case, and that the difference was such as tended to show his testimony on the trial of this case to have been false; and, further, that a witness, one Marshall, who was yardmaster of the Sioux City stockyards at the time the hogs were transferred at that city, gave testimony, based on his records, materially contradicting the testimony of plaintiff as witness on the trial of this case, which testimony of Marshall this defendant, although exercising due diligence, had been unable to discover before judgment was rendered against him.

I. The petition for new trial as originally filed sufficiently recited the falsity of the testimony of plaintiff; and it further recited that defendant had "discovered new evidence which he could not and did not discover prior to the trial by the exercise of due diligence and care; that since said trial, and only recently, he has discovered and found the yardmaster of the Sioux City stockyards, who held such position at the time the plaintiff unloaded the hogs sold to defendant in the yards at Sioux City, Iowa," and a new trial was asked on the ground of "the newly discovered evidence herein set forth and the false, fraudulent, and perjured testimony of the plaintiff." These averments constituted a very inadequate and insufficient statement of a claim for a new trial on account of the newly discovered evidence of the yardmaster, but we think it did constitute a claim, in effect, that if defendant was granted a new trial he could produce as a witness said Marshall, the yardmaster, who would give testimony contradictory to that

1. NEW TRIAL:  
amendment  
of petition.

introduced for the plaintiff on the trial of the case. Therefore we think that the amendment to this petition, filed more than a year after the rendition of the judgment, more specifically referring to the reasons consistent with due diligence why the knowledge of Marshall as to the transaction in question was not sooner ascertained, was proper; and that, as no question was made at any stage of the proceeding in regard to the insufficiency of the averments relating to the newly discovered evidence of Marshall, save that due diligence was not shown, and that such evidence was cumulative, we shall proceed to determine the case on the theory that there was a sufficient averment in this respect of newly discovered evidence. The rule is that an amendment to a motion or petition for new trial may be made after the time limited by statute for the filing of such motion or petition, if no new grounds are therein presented. *Sowden v. Craig*, 20 Iowa, 477; *Dutton v. Seevers*, 89 Iowa, 302; *Means v. Yeager*, 96 Iowa, 694; *Harnett v. Harnett*, 59 Iowa, 401.

II. An objection to the sufficiency of the allegations in the petition now made for the first time, so far as indicated by the record, is that there was no issue in the case to which this newly discovered evidence of Marshall, or the inconsistency between the later testimony of plaintiff and his testimony on the trial in this case, would be pertinent. But it was alleged in the answer that plaintiff warranted and represented that the hogs had not been unloaded from the time they were shipped from South Dakota until they were unloaded at Ida Grove, and that this warranty was false and relied upon by defendant. From the proceedings on the trial of the case preserved in the record now presented, it appears that defendant undertook to prove as material matter the unloading of the hogs into the stockyards at Sioux City, and that at the time of purchasing the hogs he told plaintiff he would not buy them if they had been

2. NEW TRIAL:  
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the two cars, which were placed side by side; while on the subsequent trial plaintiff testified that after the fat hogs were removed from the car he knew nothing further about what was done with this car and another car of hogs which accompanied it, intended for other purchasers at Ida Grove, and that he was not present when the hogs from these two cars were transferred to the cars in which they arrived at Ida Grove. We are satisfied from the record of the absolute inconsistency of the testimony of plaintiff on these two trials, and that, if his subsequent testimony on the other trial was true, then plaintiff's testimony on the trial of this case was false, and to the prejudice of this defendant.

So far as plaintiff's subsequent testimony on the other trial might be relied upon for the purpose of showing fraud practiced in obtaining the judgment in this case, under Code,

4. SAME: false testimony. section 4091, relating to new trials on petition filed within a year, we think it was not competent or material. We have held that in an action in equity, instituted after the expiration of the year within which a petition for new trial might have been filed, to set aside a judgment for fraud, it is not competent to prove that the judgment was procured by false swearing or perjury, such a fact being intrinsic and conclusively adjudicated in the judgment rendered (*Graves v. Graves*, 132 Iowa, 199), and, as the equitable relief from a judgment on account of fraud which may be granted after the expiration of the year allowed for petition for new trial is limited to the kind of relief which might have been granted under the statute on application made within a year, we see no reason why this rule is not also applicable to that ground of relief, when relied upon in a petition under the statute. It has been so ruled without particular argument or discussion in *Dooley v. Gladiator Consolidated Co.*, 134 Iowa, 468, and *Kelley v. Cummins*, 143 Iowa, 148. The decisions of this court relied upon for appellant to show

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Am. Dec. 349); *Klopp v. Jill*, 4 Kan. 482; *Strout v. Stewart*, 63 Me. 227; *Rains v. Ballow*, 54 Ind. 79.

The question still remains, however, whether these declarations and admissions of plaintiff made in his subsequent testimony on another trial constituted newly discovered evidence, in view of the fact that such declarations and admissions had not been made when the trial in the present case took place. Can the unsuccessful party have a new trial on the ground of newly discovered evidence, where such evidence was not in existence when the trial was had? We find little light on this subject in the authorities. So far as we have been able to discover, the pertinent cases support the proposition that acts and declarations, subsequent to the trial, made by the successful party and inconsistent with his right to recover, may be shown as a ground for a new trial asked for within the period within which an application for a new trial is allowed to be made. *Stauffer v. Martin*, 43 Ind. App. 675 (88 N. E. 363); *Wall v. Trainor*, 16 Nev. 131; *Welch v. Nashoe*, 8 Tex. 189. The cases of *Lasseter v. Simpson*, 78 Ga. 61 (3 S. E. 243), and *Keeley v. Great Northern R. Co.*, 139 Wis. 448 (121 N. W. 167), relate to statements of witnesses made after the trial in which they testified, and are therefore plainly not in point; for statements out of court made by a witness inconsistent with his testimony can only be shown for impeaching purposes, and new trials are never granted on the ground of newly discovered evidence which is merely impeaching in its character. The case of *Bank v. Pratt*, 31 Me. 501, is not in point; for, though the offer was to introduce the testimony of a witness who could not have testified on the trial, by reason of the disqualification of interest which had been subsequently removed, the court held the offer insufficient, because the disqualification might have been removed prior to the trial, in the exercise of reasonable diligence, and the party at the trial was aware of its existence. The cases of *Sullivan v. O'Conner*, 77 Ind.

149, and *Crow v. Brunson*, 1 Ind. App. 268 (27 N. E. 507), sometimes cited in opposition to the rule which we have announced as supported by the weight of authority, are on that point disapproved in *City of Indianapolis v. Tansel*, 157 Ind. 463 (62 N. E. 35), which is hereafter cited. It is true that in *Dooley v. Gladiator Consolidated Co.*, 134 Iowa, 468, this court suggested that the act of a party after the trial, in the nature of an admission inconsistent with his position during the trial, could not be presented as a ground for new trial by petition; but, as the refusal of the lower court to sustain the petition for new trial was supported on other grounds, the suggestion on this point is in the nature of a dictum, and we are satisfied now that acts and declarations of the successful party which, if they had occurred prior to the trial, but were not ascertained in the exercise of reasonable diligence, might be shown as grounds for new trial in the nature of newly discovered evidence may also be grounds for new trial, if they do not occur until after the trial, provided, of course, they do occur within the time within which a new trial may be asked on motion or petition on account of newly discovered evidence. An illustration of the propriety of granting a new trial on account of offered evidence of acts of the successful party inconsistent with the position taken by him on the trial is found in the cases holding that, where there has been a recovery for personal injuries predicated upon the apparent existing disability of the injured party as he appears in court constituting an element affecting the measure of damages, a new trial may be granted on a showing that immediately after the recovery of judgment his physical condition was so much better than that apparent on the trial that he must have intentionally and falsely assumed an extent of disability which did not exist. *City of Indianapolis v. Tansel*, 157 Ind. 463 (62 N. E. 35); *Corley v. New York & H. R. Co.*, 12 App. Div. 409 (42 N. Y. Supp. 941); *Brooks v. Roches-*

*ter R. Co.*, 10 Misc. Rep. 88 (31 N. Y. Supp. 179); *Cole v. Fall Brook Coal Co.*, 16 N. Y. Supp. 789.

We are well aware of the reasonable objection to the prolonging of litigation by the offer to introduce newly discovered evidence, but in the interest of justice we think that in a proper case, and within the limited period of time fixed by the statute, the unsuccessful party ought to be allowed to secure a new trial on a showing that the acts and conduct of the successful party, even after the trial, have been absolutely inconsistent with the truthfulness of his testimony on the trial. The extension of the rule as to admissibility of evidence, so as to include as competent witnesses the parties to the litigation, makes it important that every practicable check be afforded to the procuring of an unjust result by their false testimony. The trial court erred, therefore, in refusing to sustain the petition for new trial, supported by a showing that plaintiff subsequently testified on another trial in a manner entirely inconsistent with the truthfulness of his testimony on the trial of this case; it appearing that his testimony in this case may well have been the controlling consideration in the minds of the jurors in reaching their verdict.

IV. On the trial in which the judgment in this case, which it is now sought to have set aside, was rendered, the plaintiff testified unequivocally that the transfer of the hogs from the Milwaukee car to the Northwestern car was made at the Sioux City stockyards by placing the cars side by side on adjoining tracks, and running the hogs from one car into another over a chute or platform. This testimony was given on cross-examination, after the plaintiff had unequivocally stated on direct examination that they had not been unloaded from the time they left South Dakota until they reached Ida Grove, and that they had not been unloaded into or transferred through the Sioux City stockyards. In the proceedings under the petition for a new trial,

6. SAME.

Marshall, the yardmaster of the Sioux City stockyards, testified that he was such yardmaster at the time the hogs were thus transferred, and had the original records of the yards for the date on which such transfer, as appeared by plaintiff's testimony, took place. These records being offered in evidence showed that the hogs were unloaded into a certain specified pen of the yards from a Milwaukee car, and were loaded into a Northwestern car from the same pen. These records plainly tended to contradict the testimony of plaintiff given on the trial, and constituted material and competent evidence, which would be available to defendant on a retrial of the case.

With reference to the diligence exercised by defendant to discover this evidence prior to the trial, he testified that he had seen Marshall relative to calling him as a witness, and that Marshall then told him he had no recollection of the transaction, and that it was not until the subsequent trial in the other case, brought against other defendants, that defendant learned the existence of records of the stockyards which would have been available to him, had he known of them. This, we think, constituted a sufficient showing that the discovery of the evidence afforded by the records was not made until after the trial of his case, and that it was not by reason of a failure to exercise due diligence that the existence of the records was not sooner ascertained.

The trial court, in refusing a new trial under the petition, held that defendant had used due diligence in attempting to get the evidence of Marshall, but refused a new

trial on account of this evidence, on the ground that it was cumulative testimony.

7. SAME:  
diligence.

As to this feature of the case, the record shows that on the trial one Tummel, being called as a witness by the defendant, testified that he was a hog salesman in the employ of the commission firm to which were consigned the fat hogs out of the car in which the stock hogs sold to de-

8. SAME:  
cumulative  
evidence.

fendant had been brought as far as Sioux City, and that the stock hogs were unloaded in the Sioux City stockyards, and were reshipped to Ida Grove. We are clearly of the opinion that the lower court erred in holding that the records of the stockyards which constituted a part of the testimony of Marshall were merely cumulative with the testimony of Tummel on the same point. It was not evidence of the same kind, but was of a distinctively different probative character. *Murray v. Weber*, 92 Iowa, 757; *Hanousek v. Marshalltown*, 130 Iowa, 550; *Bullard v. Bullard*, 112 Iowa, 423; *Stineman v. Beath*, 36 Iowa, 73; *Hambel v. Williams*, 37 Iowa, 224; *Schnee v. Dubuque*, 122 Iowa, 459; *German v. Maquoketa Savings Bank*, 38 Iowa, 368; *Boggess v. Read*, 83 Iowa, 548; *Wayt v. Burlington, C. R. & M. R. Co.*, 45 Iowa, 217. The court erred, therefore, in holding that the records offered as a part of the testimony of Marshall were not sufficient to require the granting of a new trial, on the ground that such evidence was cumulative.

The ruling of the trial court, refusing a new trial on defendant's petition, is therefore *reversed*.

DEEMER, J.—I agree to the conclusion, but not with the third division of the opinion. Upon the proposition there involved, I am disposed to disagree with the conclusion of the majority.

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J. F. ASH, Appellant, v. CENTURY LUMBER Co.

**Master and servant: RELATIONSHIP: NEGLIGENCE: LIABILITY.** A servant may be in the general employ of one person and at the same time be employed in a particular capacity for another without being an employee of the latter; and whether he is the servant of the one or the other in doing a particular act depends on

which has the right to direct or control him in the performance of the act. In this action for a personal injury to a pedestrian it appeared that the defendant employed a man and team to haul lumber, paying a certain price per day for the services of both which was divided equally between the owner of the team and the driver. The defendant furnished the wagon but exercised no control over the driver or outfit except to direct the delivery of lumber from one place to another: *Held*, that the driver was not an employee of the defendant so as to render it liable for injury to the pedestrian through the negligent handling of the team by the driver.

**Same: NEGLIGENCE OF SERVANT: LIABILITY OF MASTER.** The master  
2 is responsible to strangers for the negligent acts or omissions of his servant done in the course of his employment, but if the servant is acting for himself or another the master is not liable.

**Same: EVIDENCE.** In this action for injury to a pedestrian by a  
3 runaway team the evidence is held to present a question for the jury as to whether the driver was negligent in leaving the team untied while unloading lumber, and in doing which the team was frightened by a plank falling upon one of the horses.

**Same: NEGLIGENCE OF DRIVER OF TEAM: LIABILITY.** The owner of a  
4 team is responsible for the negligent conduct of the driver, where the team and driver have been let to another to do certain work, in the performance of which the driver in the management of the team is not under the direction of the hirer.

**Same: NEGLIGENCE OF EMPLOYEES: EVIDENCE.** The evidence in this  
5 action is held insufficient to show negligence on the part of the employees of the defendant lumber company while assisting the driver of the team in unloading lumber.

*Appeal from Polk District Court.*—HON. W. H. McHENRY,  
Judge.

MONDAY, DECEMBER 18, 1911.

ACTION for damages resulted in a directed verdict for defendant. Judgment was entered thereon. Plaintiff appeals.—*Affirmed*.

Thomas A. Cheshire, for appellant.

*Carr, Carr & Evans* and *O. M. Brockett*, for appellee.

LADD, J.—One R. L. Cruse had loaded a wagon with two-inch plank, a foot wide and thirty feet long, and had driven along the east side of a railroad car with his team toward the south. The wagon reach had been lengthened, but the planks extended over the back bolster about thirteen feet. The lines extended to the rear hub and were laid on the ground east of the wagon and the outside tug unhooked. The front end of the wagon was opposite the car door. Employees of defendant assisted Cruse in removing the lumber from the wagon into the car. In doing this, Cruse stood at the rear of the wagon, lifted the end of a plank so as to place it on the east hind wheel, and, by bearing down and swinging out, lifted the other end so as to clear into the doorway of the car. One man then seized the other end of the plank and drew it in through an opening at the south end of the car until the other could take the plank through the doorway. Cruse had placed a plank on the wheel and swung the end over, when it caught in the edge or jamb of the car door frame. According to his story: "This happened because I suppose I misjudged my distance in raising it and did not raise it high enough at the south end. It caught about midway up from the door. At that time, there was a man standing at the car door, and he could have reached it. When it got caught, I attempted to raise it up by bearing the north end of it down. While I was doing this, it broke loose from the door, fell, and struck the west horse." The team immediately started to run, and, after they had gone a little ways, the hind wheel caught on a post and swung the team around, and at the same time the lumber slid off, striking the plaintiff, who was in the street, and throwing him upon the pavement, causing serious injuries.

It is alleged that Cruse and the other employees were negligent: (1) In that they failed to tie, secure, or un-

hitch the team from the wagon; (2) that Cruse was negligent in that he did not draw the plank far enough back so as to avoid hitting the car and prevent it from falling; and (3) that the employees in the car were negligent in failing to take hold of the plank and prevent it from falling on the horse.

The ruling on the first two grounds turns on the issue as to whether Cruse, in handling the team, was the servant of defendant, for he was not shown to have been negligent in the manner of unloading the plank, and, if guilty of any fault, this was in allowing the team to stand without hitching, or where, in event of a plank falling, they would be likely to be struck and frightened thereby. Was there sufficient evidence to carry the case to the jury on either of these issues? This necessarily depends on whether, in the handling of the team, he was the servant and under the control of defendant. The evidence disclosed that defendant owned the wagon, but that the team and harness belonged to Mrs. W. W. Wright. Long prior to the accident, her son had inquired of defendant's foreman if he could use another team. The foreman answered that he could, and asked whose it was, and, being told that it belonged to Mrs. Wright, and that it was a good team, directed him "to send him on down to work." One Mason came with the team in the morning and hauled lumber with it several months. He then arranged with Cruse to take his place, and after that Cruse drove the team, from July 18, 1907, until long after the accident, which occurred in May, 1908. The arrangement between Mrs. Wright's son and Mason was that he receive one half the earnings and Mrs. Wright the other half, and, without any conversation concerning the matter, she and Cruse divided the earnings in the same way. Defendant's bookkeeper inquired of her, when each began, whether payment should be made to her or to the driver, and she directed payment to the latter, as she trusted him. Compensation was made at the end of each week

at the rate of \$3.50 per day. According to Mrs. Wright's testimony, "He took the team as he pleased, as if it was his own, and collected for it." The horses were kept in Mrs. Wright's stable most of the time Mason drove them and all of the time Cruse did so. She furnished the feed and paid for shoeing. Cruse cared for and fed the horses. She never had anything to say about where Cruse went, nor did she "exercise any control over him in any way or direct his movements." She had nothing to do with the bargain with the defendant save as mentioned. When Cruse began work, the defendant's foreman inquired whether he was going to drive the team, and, on being told that he was, gave him a written order for a load of lumber, and where to take it, and this was the uniform practice while he remained there. Ordinarily, a laborer employed by the company helped him to load up. Upon delivering, he had the ticket signed by the recipient and returned it to the office.

The company seems to have had nothing to do with the way Cruse cared for or handled the team. The employment at the Century Lumber Company was somewhat irregular, and he was sent occasionally to do hauling for the Charles Weitz Sons, contractors, the foreman directing him so to do, but he was paid always by defendant. If Charles Weitz Sons desired the team to haul, after Cruse had quit for the day, they would telephone at the instance of the foreman to Mrs. Wright, and she would tell Cruse what was wanted. He did not drive the same team all the time, as Mrs. Wright had five horses, and he and the driver of the other team, who was her son, sometimes changed teams, and, during the winter, he teamed considerably for others than the defendant and the Charles Weitz Sons. According to his testimony, neither the Century Lumber Company nor Charles Weitz Sons had anything to do with the care or handling of the team, and Charles Weitz, a director of defendant, testified that the yard foreman "used

his judgment which team shall take this order or that order, and the directions are put on there (paper) where to take it. As to how to drive the team, he don't—Sometimes he will direct them which road if he knows the best place to go. Q. Has he any instructions or any authority to tell any teamster how to take care of his team? What he shall do to make the work and use of his team safe? Whether he shall curry it or not, or how he shall handle his team? A. No, sir. Q. Does he, to your knowledge of it, exercise any authority in the way of instructing any of the teamsters with respect to that? A. Not as we know of. Q. Has he any authority, or does he exercise any to your knowledge, to do anything with the teamsters except to tell them what loads to haul and where to take them? A. That is as far as he goes, because the drivers would generally tell him where to get off at if he went to dictating to him as to how to handle his team." After testifying that the defendant owned some teams and selected the drivers of them and did not select drivers of teams owned by others, he was then asked if to his knowledge the officers or employees of defendant "ever exercise any authority over the drivers of teams not owned by the company. A. No, sir. Q. By way of telling them how they should drive their teams, or how they should secure them or care for them in their work? A. No, sir. Q. Did any officer of the company or any representative of the company have any authority from the company to give such instructions or attempt to exercise any such control or interfere in any way with the drivers of teams not owned by the company, except to tell them what material to get and where to get it and where to take it to? A. No, sir. Q. That is true with reference to Cruse and all of those men, is it? A. Yes, sir; that includes them all."

The facts have been recited in detail because of the paucity of direct evidence relating to the employment of the team and of the driver. The relation of the parties

must be determined by inferences to be drawn from these facts. Doubtless an intelligent teamster in a retail lumber yard readily understands from slips indicating the material and destination what is required of him without being told more explicitly. So it may have been unnecessary for the owner of the team to pursue the driver employed by him with instructions. Mason arranged with Mrs. Wright's son to drive and care for her team of horses; she to furnish harness, feed, and bear the expense of shoeing, he to care for and drive the team and each to receive one-half of what he earned with it. Cruse merely stepped into and took Mason's place. The only restriction on either side from dividing the earnings was that implied by law, i. e., that they exercise ordinary care in handling and caring for the team, and in this respect both were responsible to Mrs. Wright.

It is well settled that a servant may be employed generally for one person and at the same time in a particular capacity for another. This occurs whenever the general employer engages his employee to work for a third person, and whether the employee is the servant of the one or the other in the doing of any particular act depends on which has the right to direct or control him in its performance. A man may engage to work with his own team for another without yielding to that other the control or management of his team, or he may so hire himself and team to the other that the latter shall be in control of both. Now, it is not very material whether Cruse be deemed to have been employed by Mrs. Wright as driver of her team or to work with the team as though it were his own and share the profits, if, in either event, he retained the authority to handle and control the team independent of any dictation by the defendant. That the latter so construed its engagement of the services of the driver and team is put beyond question by this record. At no time during several

1. MASTER AND  
SERVANT: rela-  
tionship: negli-  
gence: liability.

years did its officers or foreman ever suggest to the driver the manner of the care or handling of the horses, and, as seen, Weitz testified that the company had conferred on neither officer nor foreman any such power. Cruse and Mrs. Wright construed the employment in the same way, for at all times Cruse managed and controlled the team with her acquiescence and consent. While the defendant at any time might have interrupted the employment of the man and team in hauling, it was without authority to discharge Cruse as driver of Mrs. Wright's team or to substitute another in his stead as driver thereof. The only direction the company ever gave him was the notation on the slip of paper of the materials and their destination and sometimes a suggestion of the route to be taken. This practice was pursued for several years—so long that the only inference to be drawn is that under his employment he was merely to haul materials from place to place, and that the method to be pursued, the details, was left entirely to his discretion.

It is not material, then, whether Cruse was in Mrs. Wright's employment as servant, or in charge of the team as hirer of it, or under a mutual arrangement to divide the profits, save as his relation to the owner may help to determine whether he, in the management and handling of the team, was acting as servant of the defendant; for one who employs a servant to do his work is answerable to strangers for the negligent acts or omissions of such servant committed in the course of his employment. The reasons for this are, in substance, that the master is answerable for the wrongs of his servant, not because he has authorized them, nor because the servant in his negligent conduct represents the master, but because he is conducting his master's affairs, and the master is bound to see that his affairs are so conducted that others are not injured. *Farwell v. Railway*. 4 Metc. (Mass.) 49 (38 Am. Dec. 339). Of course, the

2. SAME: negli-  
gence of serv-  
ant: liability  
of master.

master's responsibility is not to be extended beyond his work. If the servant in what he does is acting for himself or another, the master is not answerable for his negligence therein.

The evidence was such as to carry the issue as to whether Cruse was negligent to the jury. He testified that lumber had previously dropped on the horses, and that sometimes they would jump, and that he knew if lumber was dropped on them in the way this lumber fell they would run and jump. He placed the team where this might happen, and, as he left them standing without being hitched or otherwise guarded, he might have been found to have been negligent. *Migliaccio v. Smith Fuel Co.*, 151 Iowa, 705. The district court in directing a verdict then must have concluded that there was no evidence tending to show that in the handling of the team he was the servant of defendant. It is often difficult to determine for whom a particular act is done. The rule was laid down by Littledale, Jr., in the first of the so-called "carriage cases" (*Laughor v. Pointer*, 5 Barn. & C. 457), that he is master who has the right of control over the person inflicting the injury at the time it was inflicted. In *Linnehan v. Rollins*, 137 Mass. 125 (50 Am. Rep. 287), the court approved an instruction to the effect that "the absolute test is not the exercise of the power of control, but the right to exercise the right of control." In *Higgins v. Teleg. Co.*, 156 N. Y. 75 (50 N. E. 500, 66 Am. St. Rep. 537), it is said that: "The doctrine of *respondeat superior* applies only when the relation of master and servant is shown to exist between the wrongdoer and the person sought to be charged for the result of the wrong at the time and in respect to the very transaction out of which the injury arose. The fact that the party to whose wrongful or negligent act an injury may be traced was at the time in the general employment and pay of another person does not necessarily make the latter the master and

responsible for his acts. The master is the person in whose business he is engaged at the time and who has the right to control and direct his conduct. Servants who are employed and paid by one person may nevertheless be *ad hoc* the servants of another in a particular transaction, and that too when their general employer is interested in the work." See, also, *Wyllie v. Palmer*, 137 N. Y. 248 (33 N. E. 381, 19 L. R. A. 285). In Wood on Master & Servant, section 287, it is said: "In order to be held chargeable for the acts of another, the person sought to be charged must at least have the right to direct such person's conduct and to prescribe the mode and manner of doing the work, the person for whose acts he is sought to be charged must, at the time when the act complained of was done, not only have been acting for him, but also must have been authorized by him, either expressly or impliedly, to do the act." Or, as expressed in section 317: "The real test by which to determine whether a person is acting as the servant of another is to ascertain whether at the time when the injury was inflicted he was subject to such person's orders and control and was liable to be discharged by him for disobedience of orders or misconduct."

The rule laid down in Shear. & R. Neg. (4th Ed.) 269, is that: "He is to be deemed the master who has the supreme choice, direction, and control of the servant and whose will the servant represents not merely in the ultimate result of the work but in all its details. The payment of an employee by the day, or the control and supervision of the work by the employer, though important considerations, are not in themselves decisive of the fact that the two are master and servant. . . . Servants who are employed and paid by one person may nevertheless be *ad hoc* the servants of another, in a particular transaction." As said in *Butler v. Townsend*, 126 N. Y. 105 (26 N. E. 1017): "One may be employed without being a servant. The relation exists where the employer selects

the workman, may remove or discharge him for misconduct, and may order not only what work shall be done, but the manner and mode of performance." In *Standard Oil Company v. Anderson*, 212 U. S. 221 (29 Sup. Ct. 254, 53 L. Ed. 483), Mr. Justice Moody, in speaking of this proposition, said: "It sometimes happens that one wishes a certain work to be done for his benefit, and neither has persons in his employ who can do it nor is willing to take such persons into his general service. He may then enter into an agreement with another. If that other furnishes him with men to do the work, and places them under his exclusive control in the performance of it, those men may become *pro hac vice* the servants of him to whom they are furnished. But, on the other hand, one may prefer to enter into an agreement with another that that other, for a consideration, shall himself perform the work through servants of his own selection, retaining the direction and control of them. In the first case, he to whom the workmen are furnished is responsible for their negligence in the conduct of the work, because the work is his work, and they are, for the time, his workmen. In the second case, he who agrees to furnish the completed work through servants over whom he retains control is responsible for their negligence in the conduct of it, because, though it is done for the ultimate benefit of the other, it is still, in its doing, his own work. To determine whether a given case falls within the one class or the other we must inquire whose is the work being performed—a question which is usually answered by ascertaining who has the power to control and direct the servants in the performance of their work."

The question as to which employer, the general or the one employing from him, is responsible for the acts of a servant, seems to have been first considered in *Laughor v. Pointer, supra*, where Littledale, J., in the course of an opinion, to which little has been added in subsequent decisions, said: "Houses and land come under the fixed use

and enjoyment of a man for his regular occupation and enjoyment in life. The law compels him to take care that no persons come about his premises who occasion injury to others. The use of a personal chattel is merely a temporary thing, the enjoyment of which is, in many cases, trusted to the care and direction of persons exercising public employments, and the mere possession of that, where the care and direction of it is intrusted to such persons, who exercise public employments, and in virtue of that furnish and provide the means of using it, is not sufficient to render the owner liable. Movable property is sent out into the world by the owner to be conducted by other persons. The common intercourse of mankind does not make a man or his own servants always accompany his own property. He must, in many cases confide the care of it to others who are not his own servants, but whose employment it is to attend to it. And in the instance of various kinds of carriages, they are frequently, in the common intercourse of the world, confided to the care of persons, who provide the drivers and horses, and it is not considered that the drivers necessarily belong to the owner of the carriage. And I think that there can not be any difference, in point of law, as to the liabilities of these persons arising from the mere ownership of the carriage, and that the ownership of the carriage makes him no more responsible than it would do if it had been sent to be repaired by a coachmaker who, in the course of repair, had occasioned any damages to other persons; but, if the injury arises from the driver, it is he, or the person who appoints him, that is to be responsible."

In *Quarman v. Bennett*, 6 M. & W. 497, it appeared that the defendants, two ladies, who kept a carriage, had been for a period of about three years, in the habit of hiring for the day or for the drive horses and a coachman from a job mistress. They had during that time always been driven by the same coachman, to whom they paid a

small gratuity for each drive. Owing to the negligence of the coachman for leaving the horses unattended when the carriage was standing at the door of the defendants' house, the horses started off and came into collision with the plaintiff's chaise. The Court of Exchequer set the verdict against the defendants aside and held that the coachman was not their servant, following the opinion of Littledale, J. Baron Parke, after pointing out that it was not material that a particular driver was requested or usually drove for defendants, or that they furnished the livery he wore, said: "Upon the principle that *qui facit per alium facit per se*, the master is responsible for the acts of his servant; and that that person is undoubtedly liable who stood in relation of master to the wrongdoer—he who had selected him as his servant, from the knowledge of or belief in his skill and care, and who could remove him for misconduct, and whose orders he was bound to receive and obey. And whether such servant has been appointed by the master directly, or intermediately through the intervention of an agent authorized by him to appoint servants for him, can make no difference." This decision has been followed in England and in this country since. *Joslin v. Grand Rapids Ice Company*, 50 Mich. 516 (15 N. W. 887, 45 Am. Rep. 54); *Frerker v. Nicholson*, 41 Colo. 12 (92 Pac. 224, 13 L. R. A. (N. S.) 1122) (cases collected in notes), 14 Am. & Eng. Ann. Cas. 730; *Little v. Hacket*, 116 U. S. 366 (6 Sup. Ct. 391, 29 L. Ed. 653); *Driscoll v. Towle*, 181 Mass. 416 (63 N. E. 922); *Fenner v. Crips*, 109 Iowa, 455 (80 N. W. 526).

In *Stewart v. California Improvement Co.*, 131 Cal. 125 (63 Pac. 177, 724, 52 L. R. A. 205), the city of Oakland hired a steam roller of defendant for use in leveling a street under the direction of the superintendent of streets. Plaintiff was injured on account of the negligence of the engineer in letting off steam and frightening plaintiff's horse. The court, in holding the company liable, said:

"One who should hire a hack and driver from a carriage company and in the use thereof should direct on what streets to drive, where to go, and when to stop, and in fact have the entire control of the movements of the carriage, would not thereby become liable for the damages resulting from the negligence of the driver in the management of the team. The driver is hired by the carriage company, presumably for his fitness in the line in which he is employed, the same as was the engineer in this case by the California Improvement Company. If damages accrue through his negligence or carelessness, such company is liable, and not the one who may have hired and used the carriage. . . . The test in all these cases is: Who conducts and supervises the particular work, the doing of which, or the careless and negligent doing of which, causes the injury or damage. Here the city simply hired the use of the street roller outfit from the defendant company, to wit, the roller, engine, and the engineer to manage the same, for so much a day. The city's agent, foreman, or street superintendent only directed or supervised how and where the street should be rolled. He did not have the control or management of the engine. This was subject entirely to the judgment of the engineer, the servant of the owner, the defendant company, who had selected and employed him for that special purpose, paid him his wages, and had the sole right to discharge him. We think the conclusion of the law, deduced by the court below from the facts found, that the defendants are liable, and not the city of Oakland, is correct."

The principle was well stated by Campbell, J., in *Frerker v. Nicholson*, 41 Colo. 12 (92 Pac. 224, 13 L. R. A. (N. S.) 1122): "In the case at bar the negligence relied upon was that of the driver, the servant of defendant. The undertaking company hired of the defendant a carriage, horses, and driver, and exercised no control whatever over the driver further than to tell him in a general

way to drive to the cemetery and return the occupants of the carriage to their homes. The defendant, and not the hirer, exercised control over the driver in the mode and manner in which the latter performed the service. The defendant, and not the hirer, employed the driver, and the defendant was the only one who had power to discharge him or direct his movements. In such circumstances it is unquestionably the law that the owner, and not the hirer, is liable in damages for injuries which result to the occupants of a carriage as a result of the driver's negligence."

These decisions and others, though differing in their facts, fully establish the principle that the owner of the team is responsible for the negligent conduct of the driver

4. SAME: negligence of driver of team: liability. where such team and driver have been let to the use of another to do certain work in the performance of which the driver in the management of the team is not under the control of the hirer. He may be directed by the latter to drive over a particular way or to haul a specified load; but, if left to drive the team in the manner of his own choosing or as directed by the owner of the team, the hirer is not chargeable with his negligence in improperly handling the team. Thus, in *Delory v. Blodgett*, 185 Mass. 126 (69 N. E. 1078, 64 L. R. A. 114, 102 Am. St. Rep. 328), it is said: "The circumstances are often such that, while the driver is the servant of the person to whom the team is furnished in reference to the question what he shall do or where he shall go, there is an implication that, as to the particulars of the management of the horses, he is the servant of his general employer in whose interest and as whose representative he will manage and direct, within reasonable limits, such matters as pertain to the health and safety of the horses and the safety of the vehicle. In these particulars, for the preservation of his property, it will be presumed that the owner of the team retains in his driver a right of control."

As observed by Holmes, J., in *Driscoll v. Towle*, 181 Mass. 416 (63 N. E. 922): "In such cases the party who employs the contractor indicates the work to be done, and in that sense controls the servant as he would control the contractor if he were present. But the person who receives such orders is not subject to the general orders of the party who gives them. He does their business in his own way, and the orders which he receives simply point out to him the work he or his master has undertaken to do. . . . In cases like the present, there is a general consensus of authority that, although a driver may be ordered by those who have dealt with his master to go to this place or, that, to take this burden or that, to hurry or to take his time, nevertheless, in respect to the manner of his driving and the control of his horses he remains subject to no orders but those of the man who pays him. Therefore he can make no one else liable if he negligently runs a person down in the street."

A case much like that at bar was *Huff v. Ford*, 126 Mass. 24 (30 Am. Rep. 645). The defendant therein kept horses and wagons for hire and let the horse and wagon in question to the city of Boston and furnished a driver by the day. The outfit was under the direction and control of the city as to where to go and where to unload and what to do in the performance of the work of paving. The driver, who was employed by the week by defendant, had the entire management of the horse, selected the route to travel, and fed and cared for the horse at defendant's barn, and it was his business to see that he was properly shod. A large plate glass window was broken by the horse kicking a loose shoe through it after he had been violently struck twice by the driver. The defendant, rather than the city, was held liable for the negligence, if any, of the driver in the manner of driving and shoeing the horse.

In *Morris v. Trudo*, 83 Vt. 44 (74 Atl. 387, 25 L. R. A. (N. S.) 33), Lavalley, in the performance of his duty

as acting superintendent of streets of the city of Vergennes to hire men and teams for the prosecution of the work, hired of defendant a double team with a driver. By the terms of the employment, the driver was to do with the team whatever work he was set to do by Lavalley—whether moving stones, or using a scraper, or drawing gravel. In drawing gravel, it was for Lavalley to direct where the gravel should be taken from, where it should be unloaded, and how it should be placed. The plaintiff, at Lavalley's direction, was assisting the driver in shoveling out a load of gravel, when the team, through the driver's neglect, started and caused him to fall. The court, in holding that the owner of the team, rather than the municipality, was negligent, said: "The precise question is whether or not, though the team and driver had been temporarily hired out by the defendant, the driver, in the specific detail of managing or handling the team, remained the servant of the defendant of whom the team was hired. One to whom the servant of another is temporarily lent or hired has, for the time being, the responsibilities of a master in so far as he may exercise the authority of a master. . . . If the driver's carelessness resulted in injury to plaintiff, the doctrine of *respondeat superior* fastens liability upon the defendant, since the negligent wrongdoing inhered in a thing in respect to which the relation of master and servant between him and the driver had never been suspended. In doing an act one can not be the servant of both a general master and a temporary master. But he may at the same time be the servant of his general master in the doing of certain acts and the servant of a temporary master in doing certain other acts. If the contract had been such that Lavalley might have put a driver of his own choosing in charge of the team, and have put the driver furnished at some other work, the defendant would be held to have relinquished the rights of a master, and to have been freed from responsibilities as such in all respects.

Such a contract, however, the evidence does not tend to show."

On no theory, save that Cruse in the handling of the team was acting for defendant, can it be said that the latter is responsible for his act in allowing the horses to stand unhitched at a place where likely to be frightened by a falling plank. But he was intrusted with the team by Mrs. Wright, rather than the defendant; she only might discharge him as the driver of the team. All three from long custom had recognized Cruse's right to handle and control the team, and we are of opinion that therein he was not acting as the servant of defendant. Decisions reaching another conclusion will be found to differ radically in the facts on which based. Thus in *Brown v. Smith*, 86 Ga. 274 (12 S. E. 411, 22 Am. St. Rep. 456), the owners of a team of mules let them with their driver to work for one Dixon, and as the latter was given full control over both, with authority to discharge the driver and substitute another, he, and not the owners, was held to be responsible for the driver's negligence. In *Jones v. Scullard* (1898) 22 B. 565, the defendant was being driven in his brougham, when the driver lost control of the horse, and it bolted into the window of plaintiff's shop doing considerable damage. The vehicle, harness, and horse as well as the livery worn by the driver, belonged to defendant; but the driver was in the employment of one Walker, a livery stable keeper at whose stable defendant kept the brougham and horse. The horse had been purchased recently, and owing to circumstances unnecessary to relate, the question as to the driver's negligence was left to the jury; but Lord Chief Justice Russell, after reviewing previous decisions, held the defendant liable, distinguishing the case from *Quarman v. Bennett*, *supra*, by saying: "The materiality of the ownership of the horse lies in this: So long as the hirer contracts with the livery stable keeper for the supply of a complete equipage to drive him by the day or hour, as

the case may be, and the stable keeper in pursuance of that contract supplies carriage, horses, and the man to drive them, the hirer has no control whatever over the driver except so far as he can indicate the direction in which he wishes to be driven. He could not order him to increase his speed, for the driver might lawfully refuse to do so on the ground that he was acting under his master's orders in driving slowly. But where the hirer of the coachman is himself the owner of the horse, he is entitled to dictate to the driver as to how fast he shall drive, and the driver is bound to take his orders from him. The driver is, in that case, under the control of the hirer as to the manner of his driving. Then comes the further consideration that the horse was one which had only come into the possession of defendant a few days before the date of the accident, and had been driven by Loveday an insufficient number of times to enable him to learn the peculiarities of the horse's temper and the manner in which, having regard to that temper, the bit and reins were required to be adjusted. Further, although the defendant could not dismiss Loveday from Walker's employment, he could, if dissatisfied with his manner of driving, refuse to be driven by him."

In *Howard v. Ludwig*, 171 N. Y. 507 (64 N. E. 172), truckmen furnished defendants each day with a truck, horses, and driver. There was testimony on the part of the defendants that the truckmen were to deliver all their Staten Island sales for \$30 per week, and that for every truck used by defendant for deliveries in New York he should pay \$5 per day, and, if packages were lost, the truckmen should be responsible for them. In behalf of the truckmen, the testimony tended to show that, in case there were no deliveries for Staten Island, the defendants should use the man, truck, and team for their New York deliveries. On the truck used was printed defendants' name, and they paid the ferriage in going from New York to the island. The majority of the court, in disposing of the case, said:

"If, as claimed by the defendants, the contract was that the express company was to deliver all of the goods sold by the defendants on Staten Island each week for \$30, and the company was to be responsible for the goods if lost, then unquestionably the defendants would not be liable in this action. But if, instead thereof, the arrangement was that the defendants should pay \$30 a week for the team, truck, and driver, and they took charge of the delivery of the goods, sending the team to Staten Island, or around New York, making deliveries, as the exigency of their business required, then the relation of master and servant was created between them and the driver, and they became liable for his negligent acts. Our examination of the testimony bearing upon this branch of the case has led us to conclude that a question of fact arose, which it was necessary for the jury to determine, and that therefore the trial court committed no error in submitting the case to the jury." Three of the judges dissented, however, and speaking through Parker, C. J., said, after stating the facts more fully: "It would seem as if authorities were not needed to support a proposition that, if a man hires out his horses and wagon and driver to another for a special purpose for a day or a week or a month, the driver does not cease to be his employee and become the employee of the hirer, any more than the horses and wagon cease to be his and become the property of the hirer, and that if an express company undertakes to do some or all of the business of a large establishment at a given price per parcel, or at an agreed sum per week or month, its employees do not cease, by operation of law, to be its employees upon commencement of the work, and become the employees of the hirer when the express company still pays them, and continues responsible for their care of the hirer's goods."

But facts of the case at bar do not bring it within the rule announced by the majority even for there defendants might have been found generally to have used and con-

trolled the truck and driver in distributing goods in New York under their direction, while here it affirmatively appears that the driver in managing the team was not under the direction of the lumber company, and more, that it was without right to direct him in such management.

Nor does it appear that the men in the car were negligent. It was not the duty of either to take hold of the end of the plank until it was inside of the car door, and, though one was shown to have stood near by, it was not made to appear that he was aware that the end had caught on the door frame, or that he might have seized it before Cruse threw it up in his attempt to loosen it. There being no evidence tending to show the defendant guilty of any want of ordinary care, the trial court rightly directed the jury to exonerate it from the charge of negligence.—*Affirmed.*

5. SAME:  
negligence of  
employees:  
evidence.

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ELIZABETH COLEMAN, v. WM. P. COLEMAN, and  
ELIZABETH COLEMAN v. TIMOTHY J. COLEMAN.

**Reformation of instruments: PLEADINGS: OBJECTION TO SUFFICIENCY.**

1 The petition in an action for the reformation of a written instrument to make it conform to the agreement of the parties must distinctly set out the original agreement and show what part of the agreement was not included in the writing, or what part of the written contract was not embraced in the original agreement. But where no objection to the sufficiency of the petition is made upon the trial, and both parties proceed on the theory that the issue of mistake was properly pleaded and they acquiesced in the determination of that question, they are bound by the adjudication and can not raise that question on appeal.

**Same: PAROL EVIDENCE.** In a suit to reform a written contract to  
2 make it conform to the agreement of the parties the rule forbidding the admission of parol evidence to vary the terms of the writing is not applicable, but the conversations and understandings of the parties prior to the execution of the writing are admissible for the purpose of determining the real agreement of the parties.

**Evidence:** CONVERSATIONS WITH A DECEDENT: WAIVER OF OBJECTION.

- 3 Where the competency of a witness to testify to conversations with a deceased person is not challenged upon the trial the objection will be deemed waived.

**Reformation of instruments:** EQUITABLE JURISDICTION. Where part

- 4 of the agreement of the parties was omitted from the writing through an oversight or ignorance of the import of the language used by the scrivener, or the understanding of the parties was not evidenced by the writing, equity will reform it to make it conform to the real agreement.

**Same:** LACHES. Where nothing had transpired to indicate that the

- 5 parties to a written contract understood it differently until suit was instituted thereon, when a mistake was promptly asserted and a reformation prayed, the right to reformation was not barred by laches.

**Same:** EVIDENCE OF MISTAKE IN WRITING. The evidence in this action

- 6 is reviewed and held sufficient to justify the reformation of a written contract to make it conform to the real agreement of the parties.

*Appeal from Webster District Court.*—HON. R. M.  
WRIGHT, Judge.

MONDAY, DECEMBER 18, 1911.

SOME time prior to his death, which occurred August 19, 1901, Jeremiah Coleman, Sr., was afflicted with a malady which he was aware would soon prove fatal. He owned two farms in Webster County, one containing one hundred and sixty acres, on which he lived, and another one hundred and twenty acres, across the road, occupied by his son Timothy J. Coleman. Wm. P. Coleman, youngest of ten children, was unmarried, and resided with his parents. The eldest son, Jeremiah Coleman, Jr., and the seven daughters, had long since married and left home. On June 12, 1901, Jeremiah Coleman, Sr., his wife, Elizabeth, joining, conveyed the one hundred and sixty acres subject to an incumbrance of \$500 to William and the one hundred and twenty acres subject to incumbrance of \$800

to Timothy by separate warranty deeds, reciting in each the consideration as \$1. At the same time, and as a part of the same transaction, an instrument in words following was executed:

Agreement of lease, made this day between Timothy J. Coleman and Mary Coleman, his wife, of the county of Webster, and state of Iowa, of the first part, and Jeremiah Coleman, Sr., and Elizabeth Coleman, of the county of Webster, in the state of Iowa, of the second part, witnesseth: That the said parties of the first part has this day rented to the party of the second part the following described premises, situated in the county of Webster, in the state of Iowa, for the term of twenty years, but to terminate at the death of both of the two second parties: The southeast one-fourth of the northeast one-fourth, and the north one-half of the southeast one-fourth, of section 3, Jackson township, Webster County Iowa. This lease given to secure to second party the payment of two hundred dollars (\$200) yearly, which first parties agree to pay to said second parties until the death of both of second parties, these being the conditions upon which second parties have deeded to first parties the property above described. On the following terms and conditions, to wit: For the rent of said premises, the said party of the second part hereby agrees to pay to the said party of the first part one and no/100 dollars, said rental to be paid promptly, as follows: [Here followed the terms generally found in a farm lease and it ended.] In witness whereof, we have hereunto set our hands this 15th day of June, 1901.

Timothy Coleman.

Mary Coleman.

his

Jeremiah X Coleman, Sr.

mark

her

Elizabeth X Coleman.

mark

An instrument exactly like the above, concerning different land, and save that Wm. P. was named and signed as party of first part, instead of Timothy and wife, and

the amount of payment was \$300 per annum, instead of \$200, also was executed.

After the death of Jeremiah Coleman, Sr., William, with his mother, continued in occupancy of the one hundred and sixty acres until the spring of 1903, when the land was rented, and they moved to Des Moines. About \$500 was realized from the sale of horses and farm implements and \$530 was received in advance for a year's rent, and with this and some borrowed money a lot with three houses on it in Des Moines was purchased. Two of these houses were rented and the other occupied by them. Out of such rent and William's earnings as an employee of the street railway company they lived, she keeping house for him until May, 1905, when he married. The plaintiff continued to make her home with William until some time after he moved back on the farm in 1908. He sold the Des Moines lot, realizing therefrom \$1,650, out of which he paid an indebtedness of about \$450 and had used most of the remainder. Up to the time of his marriage the mother performed all the work incident to keeping house for William, and thereafter aided his wife in so doing. During this period she was unusually strong and healthy for one of her years, and all she received from him was money used in meeting the expenses of the family, purchasing clothing, and to pay her railroad fare when she visited her daughters. Timothy had given her a pair of shoes and \$6, half of which she claims to have returned. On May 13, 1909, she left William, and took up her residence with a daughter, Mrs. Passou. Shortly afterwards payment of the amounts stipulated in the contracts was demanded, and, not being paid, an action was begun against each of defendants. Each defendant pleaded several defenses, and by way of cross-petition prayed that the contracts be reformed so as to include conditions that payment of the sums promised should not be made save when the mother ceased to make her home with one of defendants.

The causes were consolidated, and, upon hearing, the contracts were treated as though reformed as prayed, and judgment entered against each for the respective proportions of the annual payments that the time intervening between the departure of plaintiff from William's home and the bringing of the actions bears to one year. The plaintiff appeals.—*Affirmed.*

*Healy & Healy*, for appellant.

*Mitchell & Fitzpatrick* and *Kelleher & O'Connor*, for appellees.

LADD, J.—The farms were in the name of Jeremiah Coleman, Sr., who died August 19, 1901. Prior thereto, on June 12th of the same year, he conveyed the farm on which he resided to his youngest child, William, then single and twenty-six years of age, reciting in the deed that the consideration was \$1. On the same day he executed a similar deed for one hundred and twenty acres of land then occupied by the grantee to his son Timothy, who had been married several years, and was third youngest of the family, and thirty-two years of age. His eldest son and seven daughters were all married, and had long since left home. As a part of these transactions an instrument denominated a lease was entered into by the deceased and William and another of like import by deceased and Timothy. Each of these contained the following stipulation, save that in the one signed by Timothy the amount to be paid was \$200, while in that of William this was \$300: "This lease given to secure the second party the payment of three hundred dollars (\$300) yearly, which first party agrees to pay said second party until the death of both of second parties, these being the conditions upon which second parties have deeded to first parties the property above described." The plaintiff as wife of deceased joined him in executing the

deeds and also in signing these instruments, wherein they are designated as parties of the second part. Jeremiah Coleman, Sr., was then afflicted with a malady which, as he must have anticipated, soon proved fatal. At about the same time he paid or caused to be paid \$50 each to his eldest son and the daughters, either as a gift or as what he intended as their shares in his estate. His widow, the plaintiff, continued to reside at the same place with William until 1903, then accompanied him to Des Moines, where they remained five years, and returned with him to the farm, but left May 13, 1909, and has since made her home with a daughter. During the period of her residence with William, she was well cared for, and, notwithstanding some intimations to the contrary contained in the record, was supplied with sufficient funds for clothing, traveling expenses, and other necessities. Neither Timothy nor William question their obligation to pay the yearly sums as provided in the contracts since she left William's home; but to her demand for payment of such sums since the execution of the contracts several defenses are interposed, and in cross-petitions they assert that by mutual mistake there was omitted from each contract a provision that it was executed to secure plaintiff a home, and that the amount specified therein was to be paid yearly only in event that a home was not furnished her by William or Timothy, and defendants prayed that the contracts be reformed so as each shall include the same.

Appellants argue that the pleadings are insufficient to raise this issue, in that the cross-petition does not set forth in complete terms the original agreement and also that reduced to writing, and point out with clearness wherein there was a mistake. Undoubtedly the rules of good pleading exact that a party requesting that a contract in writing be remodeled so as to express the true understanding of the parties shall embody both the defective instru-

1. REFORMATION  
OF INSTRU-  
MENTS: plead-  
ings: objection  
to sufficiency.

ment and the real agreement in his pleading. The petition should "clearly and distinctly state what was the contract or agreement between the parties, and show what part of the contract was omitted to be reduced to writing, or what portion of the contract as it was expressed in writing was not embraced in the original contract. The plaintiff's allegations must show in terms what the tenor of the instrument ought to be to express the contract which by mistake there was a failure to execute. It is not sufficient to allege that it was the intention of the parties to make an instrument that would accomplish a certain object, and ask the court to make a writing that will accomplish that object." 18 Ency. P. & P. 824. In other words, the transaction as it occurred, and not its legal effect, should be alleged. In *Foster v. Schmeer*, 15 Or. 363 (15 Pac. 626), the court in holding that the plaintiff's allegations were insufficient said: "He would ordinarily have to set out the terms of the contract as the parties made it, what they each undertook and agreed to do, and show why its terms happened to be left out when it was attempted to be reduced to writing or how terms not agreed upon came to be inserted." In *Hyland v. Hyland*, 19 Or. 51 (23 Pac. 811), the court observed that "attorneys who prepare complaints to reform written instruments are too apt to state conclusions instead of facts. They should set out the transaction as it occurred, and not the legal effect thereof. The complaint in this case should have stated what the parties mutually agreed to do in regard to the exchange of their lands, and not the result of what they did do." In *Citizens' Nat. Bank v. Judy*, 146 Ind. 322 (43 N. E. 259), the rule is laid down that, "in an action to reform a written contract, the plaintiff must set forth the terms of the original agreement, and also the agreement as reduced to writing and point out with clearness wherein there was a mistake." Mr. Justice Story, speaking in *United States v. Munroe*, 5 Mason, 572 (Fed. Cas. No. 15,835), observed that: "If

the bill asks to correct an asserted mistake in the language of the instrument differing from the intention of the parties, and reform the instrument and obtain the consequent relief, it is not sufficient to allege generally that the intention was different, but there must be an express averment that the instrument as existing differs from the intention of the parties, stating the particulars, and the bill must conclude with a prayer for the correction of the mistake and a decree according to the reformed instrument." See, also, *Thompsonville Scale Mfg. Co. v. Osgood*, 26 Conn. 16; 34 Cyc. 971. The rule that in an application to a court of equity to remodel a contract so as to conform to what the parties thereto intended the agreement actually made and that which the parties intended must be alleged together with a statement of the ground upon which prayer for reformation is predicated seems to be without exception and generally approved.

But the appellant is not in a situation now to challenge the insufficiency of the cross-petition in these respects. No objection was made to the petition on this ground in the district court. Evidence was introduced by both parties on the theory that the issue was properly raised by the pleadings, and, whether the contracts should be reformed, having been heard and determined without objection and with the acquiescence of all parties, they are bound by the adjudication precisely as though the pleadings had been in proper form. *Beach v. Wakefield*, 107 Iowa, 567; *Caldwell v. Drummond*, 127 Iowa, 134; *Fox v. Waterloo Nat. Bank*, 126 Iowa, 481; *Osborne v. Metcalf*, 112 Iowa, 540; *Gregory v. Bowlsby*, 126 Iowa, 588; *Schopp v. Taft*, 106 Iowa, 612; *Hoyt v. Hoyt*, 68 Iowa, 703; *McLeod v. Thompson*, 138 Iowa, 305; *Marengo Sav. Bank v. Kent*, 135 Iowa, 386.

II. To all of the evidence of conversations and understandings had by the parties to the contract prior to and at the time of their execution plaintiff objected on the

grounds that these were merged in the written agreements, and that such evidence tended to vary and contradict the written instruments. Resort to such evidence would seem the only way to establish the existence of the mistake alleged, and, for this reason, the ordinary rule forbidding the admission of parol testimony to vary the terms of a written instrument is held not applicable in such actions. *Hunter v. Bilyeu*, 30 Ill. 228, 247; *Peterson v. Grover*, 20 Me. 363; *Canedy v. Marcy*, 13 Gray (Mass.) 373; *Davenport v. Sovil*, 6 Ohio St. 459; *Walden v. Skinner*, 101 U. S. 577 (25 L. Ed. 963), where it was said: "Courts of equity afford relief in case of mistake of facts, and allow parol evidence to vary and reform written contracts and instruments when the defect or error arises from accident or misconception as properly forming an exception to the general rule which excludes parol testimony offered to vary or contradict written instruments." Were it otherwise, a rule of evidence adopted by the courts as a protection against fraud and false swearing would become the very instrument of the evil it was intended to prevent. *Allen v. Hutchinson*, 45 Wis. 259; *Butler v. Threlkeld*, 117 Iowa, 116; 34 Cyc. 981. See note to *Williams v. Hamilton*, 104 Iowa, 423, in which cases are collected.

III. Counsel for appellant also argue that defendants were incompetent as witnesses to testify to any communications between them and the deceased because so rendered by section 4604 of the Code. The objection was

3. EVIDENCE:  
conversations  
with a dece-  
dent: waiver  
of objection.

but once made, and that to an inquiry concerning a conversation with the plaintiff.

Of course, this objection was not such as to invoke a ruling on the point argued, and, as the competency of the witnesses to speak of what may have passed between them and deceased was in no wise challenged, such objection must be deemed to have been waived. *Burdick v.*

*Raymond*, 107 Iowa, 228; *McDonald v. Young*, 109 Iowa, 704.

IV. It is not claimed that any precise form of expression or of words adopted by the parties was omitted from the contracts, but that, as written, these did not express the agreements as the parties previously had made them, and that this mistake happened through the error of the scrivener in reducing them to writing. Though he and the parties as well may have supposed that the condition that the payments should be made only in event the mother ceased to make her home with either son, if through oversight or ignorance of the import of the language employed on the part of Heptonstall who prepared them a part thereof was omitted or the understanding was not evidenced in the instruments as written, the cause is one appropriate for the intervention of a court of equity, and the contracts will be reformed so as to conform to what the parties really intended. It is not very important whether the mistake be denominated one of fact or of law, though it may well be doubted whether the so-called mistakes of law against which chancery relieves are not, when reduced to the last analysis, mistakes of fact. If the contract as written fails to express the agreement on which the minds of the parties met, it is not theirs, and the true agreement has not been executed, and in such a case equity will grant relief without regard to the cause of the failure to express the contract as actually made whether it be from fraud, mistake in the use of language, or any other thing which prevented the expression of the intentions of the parties. *Stafford v. Fetters*, 55 Iowa, 484; *Lee v. Percival*, 85 Iowa, 639; *Hausbrandt v. Hofler*, 117 Iowa, 103; *Bottorff v. Lewis*, 121 Iowa, 27; *Bonbright v. Bonbright*, 123 Iowa, 305. The rule was concisely stated by Mr. Justice Washington in *Hunt v. Rousmaniere's Adm'rs*, 26 U. S. (1 Pet.) 1, 7 L. Ed. 27: "Where an instrument is drawn

4. REFORMATION  
OF INSTRUMENTS: equitable jurisdiction.

or executed, which professed or is intended to carry into execution an instrument . . . previously entered into, but which by mistake of the draftsman either as to fact or law, does not fulfill that intention, or violates it, equity will correct that mistake so as to produce a conformity to the agreement." In *Beardsley v. Knight*, 10 Vt. 185 (33 Am. Dec. 193), it was said that, "where there is a mistake in reducing an agreement to writing, equity will correct it whether the parties failed to make it in the form intended or misapprehended its legal effects." The rule as thus clearly stated was applied in *Courtright v. Courtright*, 63 Iowa, 356, and *Nowlin v. Pyne*, 47 Iowa, 293. The distinction between mistakes of law which will and will not be corrected was well stated by Marshall, J., in *Wisconsin Marine & Fire Ins. Co. v. Mann*, 100 Wis. 596 (76 N. W. 777): "The mistake of law which is not the subject of relief in equity is mistake as to the legal result of known facts by reason of some misapprehension of the legal meaning of the language used; not mistake in reducing to writing an agreement upon which the minds of the parties previously met in making a preliminary verbal agreement. The latter is a mistake of law in one sense, not a mistake of law as to what the parties wanted to do in drawing the paper, but rather as to the appropriate language to accomplish their intention. If it were the former, they would be remediless in equity under the rule under discussion. But, if the latter, it is not, and has not been, considered within that rule, since the true scope of it was definitely worked out in the development of equity jurisprudence. In the one case there is a mistake in the making of the verbal contract growing out of a misconception as to the legal scope or effect of known facts; in the other there is no mistake whatever as to the contract actually made, but a mistake in the legal import of the language used in reducing that contract to writing." A mistake in a contract itself, springing from ignorance of law, is one

thing, and a mistake in the legal meaning attributable to words used to express a contract is quite another. The rule may be properly stated thus: "Where there is a mutual mistake of fact either in the making of a contract or of law or fact in the reducing of the contract to writing, the person injured thereby may have it reformed in equity in accordance with the truth, in the absence of facts or circumstances constituting a waiver of the remedy or an estoppel to the assertion of it." Enough has been said to indicate that we are not in accord with the contention that the mistake is one which equity will not correct. If there was a mistake at all, it was in failing to embody the agreement as made into the written contracts, and, as seen, for such mistakes equity affords a remedy.

V. Nor is there anything in the suggestion that defendants have been dilatory in seeking reformation of the contracts. Previous to the demands shortly before the action was begun, no claim had been made for payment from either defendant. Nothing had happened to indicate that plaintiff construed the contracts otherwise than they had. Promptly upon the beginning of the suits, they asserted their alleged mistake, and in the cross-petition prayed that it be corrected. They were not negligent in seeking relief. *Bottorff v. Lewis*, 121 Iowa, 27; *Manatt v. Starr*, 72 Iowa, 677.

VI. Does the evidence establish a mistake such as alleged in the cross-petition; that is, did the parties in agreeing that Timothy J. Coleman should pay \$200 yearly and William P. Coleman \$300 yearly include the condition that such payments should only be made when the plaintiff, their mother, did not make her home with her son William or with William or Timothy. It appears that M. M. Heptonstall, then cashier of a bank at Pioneer, prepared the deeds for Mr. and Mrs. Coleman to sign. He went to their home for that purpose, and, after having drawn the deeds according

5. SAME:  
laches.

6. SAME:  
evidence of  
mistake in  
writing.

to his testimony, "suggested that there should be some consideration, whereby, if anything should happen that Mrs. Coleman did not wish to live with the boys, that she should know what she was to receive. Q. Mr. Heptonstall, after you made that statement relative to something being prepared to show what Mrs. Coleman should receive if she elected to live at some other place than with the boys, what, if anything, did Mrs. Coleman say? A. I do not recollect. There was a general response to the suggestion that I made that it would be done. Mr. Coleman, Sr., assented to the arrangement. I did nothing further that day than make the deeds. I believe subsequent to that time I did. I can not recall whether I again was recalled at the home of Mr. Coleman, Sr. I believe I was present when the leases or agreements were signed. . . . Q. Now, Mr. Heptonstall, at the time you prepared these leases, had anything further been said to you or any further conversation with Jeremiah Coleman, Sr., or Elizabeth Coleman, his wife, than the conversation you have described? . . . A. I told them that, while everything seemed to be pleasant at that time, there might come a time when she would want to live apart from them, and that she should then have a definite amount stipulated, so that there would be no contention over it. There was then a talk as to the amount that should be stipulated. I suggested that the boys decide between them what they should pay in this case of her living apart from them, and I think J. Coleman, Jr., and W. Coleman and T. Coleman together discussed as to the amount they should pay to the best of my recollection. That they discussed in the presence of the old gentleman, Mrs. Coleman, and myself. In that discussion the amounts named were afterwards put into the leases. I believe that I prepared the lease after that time." The witness then testified that in preparing the lease he intended to conform to the intention of the parties, and that he intended to provide in the leases a proper amount—make the lease—in

the lease, and proper amount between the brothers, and the stipulated amount with the parents that they should receive in case of any dissatisfaction in living with the children. He was then asked what he had said to the Colemans at that time as to his understanding of what it meant, and answered "I said that, if she lived there, there would be no trouble about it; but, if she did not, there should be a stipulated amount. My understanding was that it was simply a life lease with this additional provision that I said—is that plain?"

The witness then testified in answer to questions that he did not understand in drawing a contract that the amounts were to be paid to Mr. and Mrs. Coleman while living with her sons. From this it is very evident that Heptonstall suggested the contracts subsequent to drawing the deeds with a view of having Mrs. Coleman protected in event she should not find living with the sons agreeable, and that he supposed he had expressed this thought in the contracts. Timothy J. Coleman testified that the arrangement between himself and William and his father and mother had been that the parents should live with William and himself the remainder of their lives, and be taken care of by them; that Heptonstall, after drawing the deeds, said that "in case the old lady should become dissatisfied, and want to go and live outside of the home of Will or me, that some amount should be stated that she should receive in that event. Father and mother both spoke up, and said that they knew there would not be anything of that kind happen or anything like that, and they did not see any occasion for such. Heptonstall still suggested that there should be some exact price fixed in event that anything should happen. It was discussed what would be reasonable or the correct amount to be stated in that case, and it was agreed upon that \$500 looked to be as reasonable for that amount. Then he asked each one if they understood with regard to that matter. Heptonstall went through then the

meaning of the contract. He said: 'You all understand now that Mrs. Coleman is to remain here and to live with you, Timothy and Will, for the balance of their lifetime?' He mentioned my father, too. He said, 'Now, in case she was to leave, you understand the amount is to be \$500 to be paid when she goes, and that all agree that they all understand the meaning of that contract to be such?' Heptonstall explained the contract verbally to father and mother so that they would thoroughly understand it."

The witness further testified that he suggested doubt as to whether the contract meant \$500 yearly only in case his mother left, but that Heptonstall stated reasons for thinking otherwise, and explained that neither of the sons were to pay while his mother was living with him or Will, and that his mother had said, in response to Heptonstall's suggestion that "she never wanted to leave her baby boy, Will, she desired to live with him all her life from that time on." The version of the transaction given by William is substantially the same. He related: That, after his parents had said to Heptonstall that the sons would keep them the remainder of their lifetime, the scrivener said: "I think I had better make out a lease for you, Mr. and Mrs. Coleman, in case you get uneasy. In case they want to go when they get old with some of their daughters, I think I better make a lease out for you to pay about \$300 a year and Timothy \$200, and that is not to be paid unless she goes away and don't live with you, but, if she does go away, you have got to pay." That his mother suggested that she did not care for such arrangement, to which Heptonstall or his wife responded, "Now, maybe Will will go and get married and go and bring a wife here, and maybe you will want to go and live with one of your daughters;" and that his father and mother finally agreed, and said: "That will be all right, that is to make—that is, of course, they didn't agree that we was to pay this while she was living with us." It was made to appear, also, that Timothy

had remained at home with his parents on the farm five or six years and William four or five years after having attained their majority, and both testified that during that time it had been talked in the family that Timothy was to have the one hundred and twenty acres and Will the one hundred and sixty acres.

The evidence leaves no doubt but that prior to the suggestion of Heptonstall neither the sons nor their parents had any thought of a contract being made in addition to the deeds. Moreover, the plaintiff resided with William from the time of her husband's death until May, 1909, without mentioning their obligation to pay under the contracts. It is true that during this period Timothy had contributed but a trifle to her support, but this may be explained on the theory that William was giving her care of which she had made no complaint to any of the children. It is true that at times he did not have ready money which she wished for necessities, but there is no contention on her part that she was not reasonably supplied with means to travel and visit her children and with suitable clothing. Jeremiah Coleman, Jr., though present when the conversation was had, was unable to recall any portion of that between Heptonstall and his parents, save the following: "My father said that he wanted my mother protected for the future, and I butted in, and then said: 'You need not worry anything about mother that way,' I says, 'if her son Jerry had to take care of her,' I said. And he answered me back, and he says: 'I do not want mother trusting to you, Jerry, or to anyone else.' He says: 'I want you to fix it right there, Mr. Heptonstall.'" And he answered, "that is what I want to know," and he started on. "Father wanted her protected in \$300 from Will and \$200 from Timothy. I did not hear him say 'yearly.'" All this is entirely consistent with the contention of the defendants. If plaintiff enjoyed a home with her sons and was provided for, she would be protected, and it was only in event that these ar-

rangements were interrupted that she should conclude to live elsewhere that the protection spoken of probably was contemplated. The plaintiff testified that Heptonstall had suggested that the sons pay her money, that this had not been talked over previously, but that she did not hear in any conversation the alleged condition that the amounts were not to be paid while she made her home with her sons. But she admitted that it was her intention to make her home with William, and during all the years she did make her home with him her conduct was entirely consistent with the contention that she was not to be paid the sums stipulated in the contracts unless she concluded to live elsewhere. The circumstance that there had been no thought of the contracts until suggested by Heptonstall after the deeds were prepared confirms the claim that the deceased and his wife had intended that the latter when a widow be cared for by the sons, and that, at the scrivener's suggestion, the contracts were executed to protect her only in event this arrangement should not prove satisfactory. All was done in the presence of deceased, who, as said, was afflicted by a fatal malady, and who in signing the contracts in reliance on the explanation of their meaning by Heptonstall must have labored under the mistake which the other parties thereto are shown to have made.

It is also to be observed that the preponderance in number of witnesses is in favor of the conclusion reached by the district court before whom these testified, and some consideration should be given to its superior advantages in determining the credibility of the several witnesses. We are not inclined to interfere with its finding that the mistake as alleged has been clearly and satisfactorily established, and that the contracts should be treated as though reformed. One-half the costs will be taxed to appellees.—*Affirmed.*

J. C. MILNER, Administrator of the Estate of MARY ELIZABETH WILCOX, Deceased, and A. I. WILCOX, Intervener, Appellants, v. F. W. BROKHAUSEN.

**Estates of decedents:** LIFE ESTATES: INCOME AND INCREASE OF PROPERTY. In the absence of limitation or restriction the income of property in which a life estate is granted, including the increase of live stock, is the property of the life tenant rather than that of the remaindermen.

**Wills:** CONSTRUCTION: INTEREST OF LIFE TENANT. Under a will bequeathing personal property to a widow for her own personal use and benefit during life, with full power to expend the whole of the personal estate and the income from the realty, with remainder over, there was an absolute gift to the widow of the entire income, and such of the personal estate as had not been disposed of by her at the time of her death.

*Appeal from Tama District Court.*—HON. C. B. BRADSHAW, Judge.

TUESDAY, JANUARY 9, 1912.

T. J. WILCOX died testate in October, 1896. In December following his will was admitted to probate, and Mary E. Wilcox, his surviving spouse, appointed executrix. In her report filed October 18, 1897, she elected to take under the will, which read:

(2) After the payment of my debts, and the legal charges against my estate, I hereby give, devise and bequeath to my beloved wife, Mary Elizabeth Wilcox, in lieu of dower, should she survive my decease, all of my property, of every name and nature whether real, personal or mixed, of which I may die seised and possessed, wherever the same may be situated, for her own individual use and benefit for and during her natural life, with full power

and authority to my said wife to expend the whole of my net personal estate and the whole of the net income of said real property after payment of taxes for her support and benefit as she may desire.

(3) Subject to the foregoing provisions, and especially subject to the life estate and interest of my said wife in and to my said property all and singular, I hereby give, devise and bequeath the remainder of my estate in fee, real, personal or mixed at the death of my said wife, to my sons, daughters and grandson, Celia Ayrhart, nee Wilcox, Ira Wilcox, A. I. Wilcox, Emma Florence Wilcox and Jesse Wilcox (son of my deceased son Dwight Wilcox) share and share alike to each of them one-fifth of my said residuary estate.

Following were directions with reference to certain advancements and other conditions not necessary to be set out. In the above report, the executrix charged herself with the appraised value of the personal property left by deceased, amounting to \$3,412.50, and reported the payment of \$602.39 of debts and expenses of administration, leaving a balance of \$2,810.11. A final report was filed May 17, 1898, from which it appears that executrix had paid a debt and expenses amounting to \$1,196.61, leaving \$1,613.50, but which the report computes at \$1,000 less, making the net balance \$613.50, and states there are some court costs she will pay, and, as the net balance was to be retained by her, prayed that she be discharged. The report was approved May 25th following, and her discharge as executrix entered. Mrs. Wilcox died intestate March 10, 1909, and J. C. Milner was appointed administrator of her estate June 1, 1909, and this action for the possession of a note and other property alleged to have belonged to her, all conceded to have been of the value of \$3,200, was begun July 10th of the same year. That she was in possession of the property in controversy at the time of her death is not questioned. The defense interposed is that all of it belonged to the estate of her deceased husband and

passed under the will to the legatees entitled to the remainder after the termination of the life estate. The defendant, F. W. Brokhausen, purchased the interest of the legatees therein except intervener and as heirs of Mrs. Wilcox, and claimed the interest of the intervener, A. I. Wilcox, who joined the administrator in asking that the latter recover, by virtue of an instrument dated November 4, 1897, which recited that in consideration of the conveyance of certain property by defendant, Brokhausen, to him, said Wilcox "does grant and convey, release, and relinquish unto the said party of the second part his heirs and assigns, the following goods and chattels, rights, and interests, to wit: All my rights, claims and interests in and to the personal estate of my father, T. J. Wilcox, late of Tama county, Iowa, deceased, the same being an undivided one-fifth interest in and to said estate as granted to me by my said father's will, which said will is duly recorded in Will Book 4 on pages 77, 78 and 79 of the Probate Records of Tama County, Iowa, and I, the said A. I. Wilcox, by these presents do relinquish, grant, release and convey all my rights which I now possess or may hereafter acquire in and to said estate and that said rights and interests are hereby granted and conveyed to the said F. W. Brokhausen, his heirs, executors, or assigns, to have and to hold the same forever." The evidence disclosed that T. J. Wilcox resided on a farm with his son Ira, that each owned one-half the personalty and was entitled to one-half of the income and increase, and that from the time of his death, without disposing of the property, Mrs. Wilcox continued with this son under the same arrangement until her death. The petition and also the petition of intervention was dismissed. The administrator and intervener appeal.—*Reversed*.

*Tom H. Milner*, for appellants.

*Willett & Willett* and *S. C. Huber*, for appellee.

LADD, J.—The sole inquiry is whether the life tenant became owner, in her individual right, of the income from and increase of the bequeathed property. Though an estoppel was pleaded, the evidence was insufficient to sustain it, and the rulings on the admissibility of evidence to which exceptions were taken could have had no bearing on the result. The will of T. J. Wilcox, who departed this life in 1896, was duly admitted to probate, and by its terms gave to his widow Mary E., all his property “of every name and nature whether real, personal or mixed, of which I may die seised and possessed, wherever situated, for her own individual use and benefit for and during her natural life, with full power and authority to my said wife to expend the whole of my net personal estate and the whole of the net income of said real property after payment of taxes for her support and benefit as she may desire.” Subject to this clause, the third paragraph disposed of what might be left, share and share alike, to his four children and a grandson. Mrs. Wilcox became executrix, and, though she charged herself with the appraised value of the property bequeathed, she retained it and managed the same as her husband had done. After the debts of testator and the expenses of administration had been deducted from such appraised value, there remained \$1,613.50. By a manifest error in computation, this was stated in the report to be \$613.50; but beyond doubt she had left the amount in value first stated, and in discharging her as executrix there was no adjudication to the contrary. No amount was fixed in the entry of discharge to which she was entitled regardless of how much remained. Upon her death, the value of the personal property then in her possession was \$3,200. Subsequently all the legatees, except the intervener, disposed of their interest therein to the defendant, Brokhausen, and he claims the share of intervener, A. I. Wilcox, by virtue of the purchase from him of his interest as legatee in testator’s estate in 1897. Neither

the administrator nor the intervener questions the defendant's title to the property or such portion thereof as would have passed, but for the disposition to defendant, to the legatees under the will, but it is contended by them that all the income derived therefrom or increase thereof after testator's death belonged to Mrs. Wilcox as life tenant and should be distributed through the administrator of her estate.

In the absence of any limitation or restriction thereof, it is well settled that the increase of stock and the income from other property belonging to such an estate inures to the benefit of and is the individual property of the life tenant, and not of the remaindermen. *Gorham v. Billings*, 77 Me. 386; *Smith v. Van Ostrand*, 64 N. Y. 278; *Lewis v. Davis*, 3 Mo. 133 (23 Am. Dec. 698); *Hall v. Robinson*, 56 N. C. 348; *Johnson's Adm'r v. Johnson's Heirs*, 8 B. Mon. 470; *Strong's Executor v. Brewer*, 17 Ala. 706; 16 Cyc. 621.

1. ESTATES OF  
DECEDENTS:  
life estates:  
income and  
increase of  
property.

As appears from the last three of the cited cases, an exception seems to have been made in the case of slaves, as it was thought to be more consistent with the feelings of humanity that children born during tenancy for life should go with the mother to the owner in remainder after the particular estate had ended than that a separation should take place by an adherence to the rule applicable to the natural increase of other property. Even this exception does not appear to have been recognized in Delaware and Maryland. *Smith v. Milman*, 2 Har. (Del.) 497; *Bohn v. Hadley*, 7 Har. & J. (Md.) 257.

But appellee insists that the life tenancy created is restricted to such portion of the income and increase as may be used or appropriated by the widow. If so, then undoubtedly such portion of the income and increase as remained at her death would belong to the testator's estate. *Rittgers v.*

2. WILLS: con-  
struction:  
interest of  
live tenant.

*Rittgers*, 56 Iowa, 218; *Stuart v. Walker*, 72 Me. 145 (39 Am. Rep. 311). But the will can not be so construed. The gift is "for her own individual use and benefit during life," and not a word in the instrument limits or restricts her right to such use and benefit. That the gift was intended to be absolute is indicated by the power of alienation of the "net personal estate" being added as a separate gift, thus recognizing that the use had been disposed of. Moreover, the third clause does not purport to bequeath to the remaindermen anything other than the portion of the original estate which is left.

The district court was in error in holding that the income from or increase of the property during the life tenancy did not belong to the widow in her individual right. As the value of the personal property left by testator less debts and expenses of administration was \$1,613.50, and the value of that of which she was in possession at the time of her death and which defendant appropriated was \$3,200, the latter must account for \$1,586.50 as belonging to her estate.

For the entry of such orders as may be necessary, in view of the situation, to settle and distribute the estate, the cause is remanded.—*Reversed*.

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FRANK BRUYNEEL, Appellant, v. SCOTT WIES ET AL.,  
Appellees.

**Extradition:** HABEAS CORPUS. One held under executive warrant to answer the criminal charge of deserting his wife and children, made against him in another state, can not obtain a discharge on *habeas corpus* by showing that since the desertion he obtained a divorce from his wife in this state and has since remarried; as it will be presumed that the courts of the foreign state will give faith and credit to the decree of our court and properly determine whether the divorce and remarriage bar the prosecution.

*Appeal from Polk District Court.*—HON. LAWRENCE DE GRAFF, Judge.

TUESDAY, JANUARY 9, 1912.

THIS is an appeal from an order of the trial court dismissing a petition for a writ of *habeas corpus*.—*Affirmed*.

*Walter McHenry*, for appellant.

*W. H. Wallingford*, for appellee.

EVANS, J.—In the absence of direct statement in the printed matter before us, we draw the inference that the defendant is a public officer of some kind who has the custody of the plaintiff as a prisoner. The plaintiff formerly lived in Indiana and left there January 11, 1909. After his departure, criminal proceeding was instituted against him in Indiana charging him with the unlawful desertion of his wife and six children, and charging such desertion to have occurred on January 11, 1909. A requisition from the Governor of Indiana was honored by the Governor of Iowa, and the plaintiff is now held under executive warrant and is about to be returned thereunder to Indiana as a fugitive from justice. It is conceded that all the proceedings relating to the requisition and extradition are regular in form. Upon the hearing in the district court, it was made to appear that on November 22, 1910, in the district court of Polk county, Iowa, the plaintiff obtained a divorce from his Indiana wife, and that he has since remarried in such county. It is also conceded that all the proceedings in relation to such divorce suit were regular in form; notice being given by publication. The argument made in behalf of plaintiff here is that it is obligatory upon the state of Indiana to give "full faith and credit" to the judgment of the district court of Polk county, Iowa. The

pertinency of such argument is based upon the assumption that the courts of Indiana will ignore the decree of divorce entered by the district court of this state. We can not indulge in any such assumption. The Constitution of the United States requires that full faith and credit shall be given in each state to the judicial proceedings of every other state. We will readily assume that this constitutional provision will not be overlooked by the courts of sister states.

It is urged that the decree of divorce and the subsequent marriage of the plaintiff to another wife is a bar to his further prosecution for the desertion of his Indiana wife. That is a question to be determined by the court wherein the prosecution is pending. The offense with which the plaintiff is charged antedated his decree of divorce. Assuming the subsequent decree of divorce to be valid everywhere, it yet remains for the Indiana court to determine what, if any, effect it can have upon the criminal proceeding pending therein.

The order of the trial court is *affirmed*.

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ELIZABETH PARKS, Appellee, v. TOWN OF LAURENS,  
Appellant.

**Exclusion of evidence:** HARMLESS ERROR. The exclusion of evidence regarding a matter which has been established by the undisputed testimony of other witnesses is not prejudicial error.

**Personal injury:** DAMAGES: FUTURE SUFFERING: INSTRUCTION. An instruction in a personal injury action that recovery for future pain and suffering must be limited to such as may be found from the evidence that plaintiff will suffer is proper, and not objectionable as permitting damages for future suffering not reasonably probable.

**Trial:** VERDICT: COERCION BY COURT. Where the jury reported to the court that it had not yet reached an agreement and that the question on which it was divided was one of fact, it was not

improper for the court, in ordering them to again retire for further deliberation, to suggest the desirability of their agreeing upon a verdict, and had no tendency to coerce a verdict not the deliberate judgment of the jury.

*Appeal from Pocahontas District Court.*—HON. A. D. BAILIE, Judge.

TUESDAY, JANUARY 9, 1912.

ACTION at law to recover damages for personal injury. Judgment for plaintiff, and defendant appeals.—*Affirmed.*

*J. M. Berry and F. C. Gilchrist*, for appellant.

*Healy & Healy and R. B. Burnquist*, for appellee.

WEAVER, J.—The plaintiff, a woman of sixty-eight years, claims to have fallen from a public street crossing into the gutter below, breaking her arm and receiving other injuries. This accident, she avers, was the direct result of the defendant's negligence in the construction and maintenance of the crosswalk, and without negligence on her own part. The specific negligence charged is that the apron or sloping part at the end of the crossing was too narrow to afford a reasonably safe passage, and was left without guards or lights to enable persons rightfully using the same to avoid stepping or falling into the gutter. The defendant denies that it was in any way negligent with respect to the crossing, and denies that plaintiff was in the exercise of reasonable care for her own safety at the time of her injury.

The facts attendant upon plaintiff's injury are, in most respects, the subject of no material dispute. With her husband and others, she was returning to her home from church about nine o'clock on the evening of January 24, 1909. It was quite dark, and upon approaching this cross-

ing plaintiff's husband suggested that they proceed in single file. Thereupon plaintiff took the lead, and in attempting to make the passage she stepped over the outer edge of the plank with her left foot and fell, receiving the injury of which she complains. Appellant does not argue that plaintiff failed to make a case for the jury, but seeks a reversal because of alleged prejudicial errors occurring upon the trial.

It is first said that the court improperly sustained plaintiff's objection to certain cross-examination of the street commissioner of the town. This witness was called by the plaintiff, and testified to the condition of the crossing in question and the materials of which it was constructed. On cross-examination, he was asked if the crossing was not made of three twelve-inch plank, and, upon plaintiff's objection that the inquiry did not pertain to anything brought out in the direct examination, the answer was excluded. It may be conceded, for the purposes of the case, that this ruling was erroneous, but it was clearly without prejudice to the defense, for the measurements of the crossing and the size, width, and number of plank used in its construction were established by the undisputed testimony of other witnesses.

Again, it is said the court erred in failing to instruct the jury that damages for future pain should not be allowed, except upon an affirmative showing that plaintiff would, in all reasonable probability, undergo such suffering as the result of her injuries. The authorities cited in support of this objection are all directed to criticism of instructions in which juries have been told that a plaintiff, entitled to recover for personal injuries, is entitled to damages, not only for pain and suffering he has already endured therefrom, but also for the pain and suffering which he "may" endure in the future. This is said to be

1. EXCLUSION OF  
EVIDENCE:  
harmless  
error.

2. PERSONAL IN-  
JURY: dam-  
ages: future  
suffering:  
instruction.

erroneous, in that it permits the jury to go into the domain of mere speculation and conjecture; and that recovery should be permitted for such future suffering only as the jury may find from the evidence the plaintiff is reasonably certain to undergo. But in the case at bar the court did not give any such loose or general instruction as is condemned in the cited cases. *Fry v. Railroad Co.*, 45 Iowa, 416; *Ford v. Des Moines*, 106 Iowa, 96; *Sanders v. O'Callaghan*, 111 Iowa, 574. On the contrary, the jury was told in clear and specific terms that recovery for future pain must be limited to such as should be found "from the evidence that the plaintiff will suffer." This states the rule even more favorably for the defendant than would an instruction couched in the language for which counsel contend. A finding that future suffering is "reasonably probable" may be justified upon less cogent showing of evidence than a finding that such suffering *will* follow. It may be that, had the court given the instruction in the language of counsel, it would not have been erroneous, but its omission is not error, if the instruction actually given sufficiently states the rule in another form. Instructions omitting the phrase which appellant thinks should have been employed, and not differing materially from the one given by the trial court in this case, have often been approved. *Kendall v. Albia*, 73 Iowa, 246; *Lamb v. Cedar Rapids*, 108 Iowa, 634. The exception can not be sustained.

Further objection is made that the court in its instructions assumed that plaintiff stepped or fell from the crossing, when there was evidence to justify a finding that she was not on the crossing, but on the ground at the side of the crossing, and thus walked into the gutter. We do not so read the record. It is there shown with clearness and without substantial dispute that when plaintiff took the lead of the party crossing the street she advanced several steps on the planked way, when, owing to the darkness or other-

wise, she stepped over the side of the apron. Any other finding by the jury as to this fact would have been contrary to the evidence.

The case having been duly submitted, and after several hours no verdict being returned, the jury was called into court. Having responded to the inquiries of the court that an agreement had not yet been reached, and that the question over which the jurors had divided was one of fact, the court ordered them again to retire for further deliberation, saying: "It seems to me you ought to be able to agree upon a verdict. It is desirable that you agree." This action is said to have been an undue interference with the functions of the jury, and had a tendency to coerce a verdict which did not reflect the deliberate and unbiased opinion and judgment of all the jurors. We think the objection is untenable. The court may very properly suggest to the jury the desirability of an agreement; and, so long as care is taken to avoid any expression of opinion as to the merits of the case, or suggestion as to the nature of the verdict to be returned, the admonition is not open to just criticism. It is, of course, possible that such advice, by too insistent repetition, emphasized by repeated refusals to accept a reported disagreement, may amount to moral coercion, and therefore prejudicial error, but nothing of that kind is shown in the case at bar. The jury had not expressed any opinion that an agreement was impossible, and had made no request to be discharged; and there is nothing whatever in the record to suggest the thought that the verdict does not fairly represent the final, deliberate and unanimous opinion of all its members.

Nothing is shown which will justify us in ordering a new trial, and it follows that the judgment of the district court must be, and it is, *affirmed*.

3. TRIAL:  
verdict:  
coercion by  
court.

**MAX EMANUEL, Appellee, v. A. T. COOPER, Appellant.**

**Attorney and client: SUMMARY PROCEEDINGS: JURISDICTION.** Where

- 1 an attorney receives money directly from his client in the county of his own residence, to be applied for his client in a proceeding in another county, and he fails to make the application as directed, the court of the county of his residence has jurisdiction to proceed against him summarily to recover the sum.

**Same: TERMINATION OF RELATION.** An attorney's duty to his client

- 2 ceases ordinarily when the proceeding respecting which he was employed has been terminated adversely to his client; so that if he thereafter receives money to satisfy the judgment he does so in a new relation not necessarily connected with the original action.

**Same: BOND: SUFFICIENCY.** The giving of a second bond to dis-

- 3 charge an attorney's lien, because of some defect in that originally given, which was sufficient in form and substance and was filed before the determination of the proceeding, was a substantial compliance with the statute and protected the attorney, although the same was not given for some little time after the proceeding was commenced: And the fact that the attorney gave a counter bond under the statute would not prevent the client from recovering the money due him.

**Same: COUNTERCLAIM BY ATTORNEY.** While an attorney may be al-

- 4 lowed for his services in a summary proceeding to recover money advanced to him, he can not recover in the absence of any evidence of the value of his service.

*Appeal from Linn District Court.*—HON. M. P. SMITH,  
Judge.

TUESDAY, JANUARY 9, 1912.

SUMMARY proceedings by motion to compel defendant, who is an attorney at law, to pay over to plaintiff certain money received by him in his professional capacity. The

trial court sustained the motion, and defendant appeals.  
—*Affirmed.*

*Dawley & Wheeler*, for appellant.

*Voris & Haas*, for appellee.

DEEMER, J.—Plaintiff, a resident of California, employed defendant in July of the year 1907 to render certain legal services for him with reference to matters in the district court of Johnson county, Iowa, and about April, 1908, he, plaintiff, delivered to defendant the sum of \$177.62 to be deposited with the clerk of the Johnson county court in a garnishment proceeding there pending. This defendant failed to do, and he refused to return the same to plaintiff, claiming an attorney's lien thereon. On June 2, 1910, plaintiff tendered a bond to defendant for the release of the lien as provided in sections 322, 330, and 331 of the Code, to which reference will hereinafter be made. At that time defendant made no objection to the bond, and on the next day it was filed with the clerk of the Linn county district court. On this day plaintiff also filed his motion in the Linn county district court, asking that defendant be compelled to return the money received by him. On the same day defendant filed a bond under section 330 of the Code, to which we shall presently make further reference. On June 11th, defendant filed an itemized statement, or bill of particulars of his account against the plaintiff, and on the 14th of that month he filed objections and resistance to plaintiff's motion. On June 25th, plaintiff tendered an additional bond under the sections of the Code hitherto mentioned; no objection being made thereto by defendant on account of its form or sufficiency. The matter came on for hearing before the court on June 27th, resulting in an order directing defendant to return the money, which order, however,

expressly declared that the value of defendant's services to plaintiff were not considered or taken into account for the reason that no testimony was taken with respect thereto. The chief objections made by defendant to the motion were (1) that the Linn county district court had no jurisdiction; (2) that the bond or bonds tendered to defendant did not comply with the statute; (3) that, as defendant filed a bond to the plaintiff under section 331 of the Code, he was entitled to retain the money; and (4) that the defendant still has an attorney's lien upon the money placed in his hands for services rendered.

As the proceedings are summary in character and based upon statutes of the state with reference to attorney's liens, it seems necessary to an understanding of this opinion that these statutes be set out. Section 3826 of the Code, so far as material, reads as follows: "Judgments or final orders may be obtained on motion . . . by clients against attorneys; . . . for the recovery of money or property collected for them, and damages; and in all other cases specially authorized by statute." Section 3830 is in this language: "It (the motion) shall be heard and determined by the court without written pleadings, and judgment given according to the very right of the matter." Section 321 provides for attorney's liens, and specifically states that an attorney shall have a lien upon any money in his hands belonging to his client for services rendered. Section 322 reads as follows: "Any person interested may release such lien by executing a bond in a sum double the amount claimed, or in such sum as may be fixed by any district judge, payable to the attorney, with security to be approved by the clerk of the Supreme or district court, conditioned to pay any amount finally found due the attorney for his services which

bill of particulars of the services and amount claimed for each item, or written contract with the party for whom the services were rendered." Sections 330 and 331 read as follows: "An attorney who receives the money or property of his client in the course of his professional business, and refuses to pay or deliver it in a reasonable time, after demand, is guilty of a misdemeanor." Code, section 330. "When the attorney claims to be entitled to a lien upon the money or property, he is not liable to the penalties of the preceding section until the person demanding the money proffers sufficient security for the payment of the amount of the attorney's claim, when it is legally ascertained. Nor is he in any case liable as aforesaid, provided he gives sufficient security that he will pay over the whole or any portion thereof to the claimant when he is found entitled thereto." Code, section 331.

These are the relevant statutes bearing upon the questions submitted on this appeal. The jurisdictional question arises out of this state of facts. The proceedings in which

1 ATTORNEY AND  
CLIENT:  
summary pro-  
ceedings: Jur-  
isdiction.

defendant performed part of his services were in Johnson county, while defendant resides in Linn county, and, as we understand it, there received the money which he was to deposit in a garnishment proceeding in Johnson county, which he never did. Some of defendant's services seem to have been rendered in Linn county, and they do not appear to have had any connection with the Johnson county litigation. The receipt of the money in Linn county and the fact that it never was deposited in the Johnson county court is conceded. It is strenuously contended that as there was no case in Linn county, and as the money was deposited with defendant to be used in connection with proceedings in the Johnson county district court, the district court of Linn county had no right to entertain the motion. This proposition is based primarily upon the thought that such a motion will not lie save

where the money is deposited with reference to some proceeding in court, and that the court in which that proceeding is pending has exclusive jurisdiction to entertain such a motion as was here filed. This, we believe, is a mistaken notion. The remedy may be adopted, although there be no proceeding in court. Jurisdiction is assumed because of the fact that the attorney is an officer of court and subject to the summary jurisdiction of the courts in which he practices. It extends to any matter in which an attorney has been employed by reason of his professional character. Courts have always assumed power even without a statute to compel an attorney or solicitor to do his duty; and, if he receives money or other property belonging to his client in the character of an attorney, or because of his position as such, he may be dealt with in a summary way because of his failure to properly perform the duties of his office. Lord Tenterden, at an early date, announced this rule: "When an attorney is employed in a matter wholly unconnected with his professional character, the court will not interfere in a summary way to compel him to execute faithfully the trust reposed in him; but, when the employment is so connected with his professional character as to afford a presumption that his character formed the ground of his employment by the client, there the court will exercise jurisdiction." See *Ex parte Watts*, 1 Dowl. 512.

The proceeding is not to enforce contracts, but to secure from attorneys the proper performance of their duties as officers of court. It is founded upon the rule that a court will summarily enforce an attorney's undertaking by reason of the fact that confidence and trust are necessarily reposed in him. The question of jurisdiction necessarily depends, then, to some extent at least, upon what the duties were which were assumed by the attorney. If not in connection with pending litigation, manifestly the court of his residence has jurisdiction. If, as a result

of a proceeding in some other court, then in the court where the proceedings were had. *Union Bldg. Co. v. Soderquist*, 115 Iowa, 695.

But if he receives money directly from his client, as in this case, at the place of his residence, with reference to a proceeding in another county, and fails to go into that county to apply the money as directed, we are constrained to hold that the court of the county of his residence has jurisdiction over him, because he is an officer of that court. In such a case he receives the money for a definite purpose, to wit, to pay or release a judgment against his client, and not necessarily because of his previous employment in the case.

As a rule, an attorney's duty to his client as such ceases in connection with any given case when the proceedings are ended adversely to his client. And, if there-

after he is intrusted with money to pay or satisfy the judgment, he assumes a new relation not necessarily connected with the

original litigation. The record is not clear regarding the nature of defendant's employment prior to the time he received the money in question. From the bill of particulars filed by him it would seem that he rendered services for the plaintiff in some cases in Johnson county and in some other matters not shown to have been at any other place than the one of his residence. In the *Union Bldg. case, supra*, relied upon by appellant, we suggested the thought which is here amplified in these words: "No doubt there may be cases where a special proceeding of this character can be instituted for breach of duty by the attorney not connected with any proceeding in court, and in that event it should be instituted no doubt in the county of his residence."

The required bond tendered by plaintiff contained this condition: "Now, therefore, this bond is given to the said A. T. Cooper under the provisions of sections [322]

330 and 331 of the Code of Iowa of 1897, and if the said  
3. SAME: bond: Max Emanuel shall pay to A. T. Cooper  
sufficiency. any amount, not exceeding the amount of this  
bond, which the said A. T. Cooper shall legally establish  
against him, . . . said bond to be void; otherwise in full  
force." The figures in brackets were not in it at that time.  
They were inserted without authority from the sureties some  
time after the tender and before it was filed with the clerk.  
This was made ground of objection in the resistance filed by  
defendant on June 14th. Thereafter, and on June 25th,  
the additional bond was tendered which was sufficient in  
form and substance; but to this the defendant filed the  
following objections at the time of hearing on June 27th:  
"It does not appear that the said bond was signed by the  
authority of said Max Emanuel, or that his attorneys,  
Voris & Haas, have authority to bind said Emanuel by the  
execution of such bond, and the defendant further objects  
on the ground that said bond was not offered until two  
weeks or more after the commencement of this proceeding,  
and same can not be used as a foundation for such pro-  
ceedings, and the defendant objects to the bond, 'Exhibit  
1,' for the reason that the interlineation appears upon its  
face which would invalidate said bond as to the surety  
thereon." No objection to this bond was made at the time  
of tender, nor were any lodged against the first one until  
the final objections to the motion were filed on June 14th.  
Without determining the effect of the interlineation in the  
bond, we are constrained to hold that the giving of the  
second after objection was made to the first, and, before  
the hearing upon the motion, was a sufficient compliance  
with the statute and ample protection to the defendant.  
Section 357 of the Code reads as follows: "No defective  
bond or other security or affidavit in any case shall preju-  
dice the party giving or making it provided it be so  
rectified, within a reasonable time after the defect is dis-  
covered as not to cause essential injury to the other party."

This section has been applied to all sorts of bonds, and we see no reason for not applying it here. As the form and substance of the second bond are admitted to be sufficient, there is no merit in defendant's contention with reference to defective bonds.

Contention is made that plaintiff is not entitled to the return of the money because defendant gave bond under section 331 of the Code. This point is squarely ruled adversely to defendant in *Cross v. Ackley*, 40 Iowa, 493; and we see no reason for departing from the doctrine of that decision. Defendant is amply protected by the bonds given by plaintiff and has his remedy upon these bonds.

Lastly, it is argued that the trial court should have considered defendant's claim for services and allowed the reasonable value thereof. As the case was not tried on that theory and defendant offered no testimony as to the value of his services, there was no error here. That the trial court had power to make an allowance is held in *Union Bldg. Co. v. Soderquist, supra*, but, in the absence of testimony, there was no error in leaving that matter undetermined. As the lower court did not consider this phase of the case, its order is not an adjudication, and defendant must proceed by action on the bond or bonds given by plaintiff. *Jamison v. Ranck*, 140 Iowa, 635, 119 N. W. 76.

No error appears, and the order must be, and it is, *affirmed*.

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EVA CUMMINGS v. THE PENNSYLVANIA FIRE INSURANCE Co., Appellant.

**Insurance:** PROVISIONS OF LOST POLICY: EVIDENCE. In this action upon a lost fire insurance policy the evidence is held sufficient to take the question of whether a lightning clause was attached to the policy to the jury.

**Same:** SECONDARY EVIDENCE: SELF-SERVING DECLARATIONS. Where sec-

2   ondary evidence is resorted to it must be of the best degree obtainable. In this action upon a lost policy of insurance plaintiff contended that a lightning clause was attached to the policy and defendant offered in evidence the policy register and entries of the agent in connection therewith, which failed to disclose a lightning clause. A witness testified that the register was in the handwriting of the agent, since deceased, and if there had been a lightning clause it would have been noted on the register. *Held*, that as the entries were not verified by anyone having a knowledge of the facts recited therein they were self-serving declarations and therefore inadmissible.

**Same: DOCUMENTARY EVIDENCE.** Nor were the entries admissible under the Code as having been made in a professional capacity or in  
3   the ordinary course of professional conduct; as insurance agents are not classed as professional men, nor are their duties in these respects of a professional character, within the contemplation of the Code.

**Same: LOSS FROM LIGHTNING: POLICY EXCEPTIONS.** The provision in  
4   a policy of insurance that "if the building or any part thereof fall, except as a result of fire, all insurance by this policy on the building or its contents shall immediately cease" has reference to the falling of the building from causes other than those insured against, and does not operate to relieve liability for damages resulting from a fall of the building as the result of lightning, where the policy covers loss from lightning.

**Same: LOSS FROM LIGHTNING: DIRECT DAMAGE.** The provision of a  
5   policy covering direct loss or damage caused by lightning includes damage to goods from water and debris into which they were thrown by the fall of a building as the result of lightning.

*Appeal from Allamakee District Court.—HON. A. N. HOBSON, Judge.*

ACTION on insurance policy resulted in judgment as prayed. The defendant appeals.—*Affirmed.*

*Douglas Deremore and Barger & Hicks, for appellant.*

*Wm. S. Hart, for appellee.*

THURSDAY, JANUARY 11, 1912.

LADD, J.—In the afternoon of June 20, 1908, a storm of unusual violence raged at Waukon. Several inches of rain and hail fell within a half hour. The waters gathered in the depression along the course of a creek bed, through which a covered sewer had been constructed, several feet deep, and flowed rapidly past the southwest corner and west side of a brick building containing plaintiff's millinery stock and fixtures. As the hail ceased falling, the west wall of the building collapsed, and most of the property mentioned was precipitated into the water and debris. Whether this was caused by a stroke of lightning or water undermining the wall was an issue upon which the evidence was in conflict. The millinery stock and fixtures were covered by a policy issued by the defendant, and the issues were: (1) Whether a lightning clause insuring against damages caused by lightning was attached to the policy; (2) whether the wall was struck by lightning; (3) whether the injury to the insured property by debris and water was the direct consequence of the lightning; and (4) whether the policy subsequently was so canceled as to avoid liability. The evidence showed conclusively that neither the defendant's agent nor the insured had any intention of canceling the policy for the period of the term elapsed, and that the policy was merely terminated because the agent thought it advisable, as the goods were taken to another location where the premium was higher, that a new policy issue instead of transferring that then existing. The last defense mentioned then was without merit. As said, the evidence was in sharp conflict as to whether the building was struck by lightning, and we are not inclined to interfere with the verdict of the jury.

I. The loss of the policy was sufficiently explained, and there is no controversy concerning its contents, save that plaintiff claims that a lightning clause was attached thereto, while this is denied by defendant. The latter insists that the evidence was insufficient to carry this issue to

the jury and complains of the refusal of the court to receive in evidence a purported copy of the written portion of the policy made by the recording agent as tending to prove that the lightning clause was not attached. The policy was issued March 27, 1908, by being countersigned by the recording agent of defendant, F. H. Robbins. On Monday, the second day after the fire, plaintiff called on him for a copy of the policy lost, and asked that it be transferred to cover her goods in their new location. Instead, Robbins issued a new policy dated June 22, 1908, for the term of one year, at a higher rate, and delivered it to plaintiff without explanation. She handed this to her attorney, who, noticing the lightning clause attached, advised her that it was all right and made no further examination at that time. A few days later, upon noticing the difference in date, he interviewed Robbins about the matter, and the latter informed him that the policy was an exact copy of that lost, except the change in date, the rate of premium, and the location of the goods insured; that, as these had to be changed, he had thought it as well to issue a new policy, and had done so without intention of canceling that previously issued. Subsequently Robbins informed Murphy that the company had demanded that the lightning clause be detached and was permitted to do so upon giving a receipt therefor. The plaintiff had not noticed whether the lightning clause was attached to the policy lost, but testified that some seventeen or eighteen years previous she had applied to Robbins for a policy insuring her goods against fire and lightning and received such a policy, issued by defendant, and that each year upon the expiration of the existing policy in the defendant company the agent had handed her a policy as a renewal of that which had expired. Presumably each renewal was in terms and on conditions of the policy renewed. *Thomason v. Ins. Co.*, 92 Iowa, 72; see, also,

1 INSURANCE:  
provisions of  
lost policy:  
evidence.

*Taylor v. Ins. Co.*, 98 Iowa, 521; *McLaughlin v. Ins. Co.*, 126 Iowa, 149. The evidence was sufficient to carry the issue to the jury.

II. The main contention of appellant is that the court erred: (1) In receiving the evidence of Murphy and plaintiff, for that it was not the best evidence available, it appearing that Robbins, as defendant's recording agent, kept a register containing a copy of all policies, including that lost, in his office; and (2) in refusing to receive such register so showing in evidence. Mrs. Eddy, who succeeded her father, F. H. Robbins, who died before the trial, as defendant's agent at Waukon, testified that in issuing a policy, a daily report is first made out to be sent to the company, and an exact copy thereof entered into the policy register, and then the policy prepared; that in the register and daily report a description of the property, the amount for which insured, the date and the premium, and the rate are noted, and, if a lightning or gasoline clause is attached to the policy, this is indicated in the policy register, and, if any change is made subsequently, this is also noted in the register and the company notified. The daily report is mailed to the company and the register retained by the agent. She testified this was as her father had taught her, and that, so far as she knew, his policy register was kept in the same way and the entries made at about the time of the transactions and were in accordance with what he did with the different risks, and, upon being shown what purported to be the register entry concerning the lost policy and of each preceding policy issued to plaintiff by defendant during the ten years previous, she said these were in the handwriting of her father. The several entries were then offered in evidence, including that of the lost policy, which, as apparently made when the policy was issued, may be set out:

2 SAME: secondary evidence: self-serving declarations.

Policy No. 384; name, Miss Eva Cummins; Commencement of risk, Mch. 27, 1908; expiration of risk, Mch. 27, 1909; amount insured, \$1,100.00; rate, 1.32; Prem. \$14.52. \$950.00 on her stock of millinery goods, ladies furnishing goods, ribbons, trimmings, fancy goods and such other goods as are usually kept for sale by dealers in that branch of business, and \$150.00 on her show cases, mirrors, carpets, rugs, stands, tables, racks, desks, chairs, stools, millinery holders, millinery tools and appliances, stoves, pipe and fuel, all while contained in the first story and in cellar of the two story brick composition roof building known on Sanborn map of Waukon, Iowa, as number 206, block 1, sheet 2. Other short time insurance permitted on stock in spring and fall, but in no case to exceed three fourths ( $\frac{3}{4}$ ) of value at time of writing. Company's gasoline stove permit attached to policy.

On objection, the entries were excluded.

It may be conceded that, even though plaintiff can resort to secondary evidence to prove the lightning clause was attached to the policy, this must be the best attainable. Though the rule seems to be laid down broadly in England that there are no degrees in secondary evidence, the current of authority is otherwise in this country. *Harvey v. Thorpe*, 28 Ala. 250, 260 (65 Am. Dec. 344); *Cornett v. Williams*, 20 Wall. 226, 246, (22 L. Ed. 254); *Wilson v. South Park Commissioners*, 70 Ill. 46. And this court seems to be committed to the American doctrine. *Conger v. Converse*, 9 Iowa, 554; *Higgins v. Reed*, 8 Iowa, 298; *Zalesky v. Ins. Co.*, 102 Iowa, 512. But the question does not arise in this case for the reason that the entries offered were not admissible at all. They were mere memoranda made by the agent of the company, and not verified by any one knowing the facts recited therein. Quite generally such private entries are excluded whether made by a party to the controversy, or his agent, as in the nature of self-serving declarations. *Taylor v. Ry.*, 80 Iowa, 431; *Lyman v. Bechtel*, 55 Iowa, 437; *Hoffman v. Ry. Co.*, 40 Minn. 60, (41 N. W. 301); *Kellogg v. Webster*, 140 Wis. 341,

(122 N. W. 737); *Connor v. Ry.*, 56 Wash. 310 (105 Pac. 634, 25 L. R. A. (N. S.) 930, 134 Am. St. Rep. 1110); *Strauss v. Insurance Co.*, 9 Colo. App. 386, (48 Pac. 822); *Railway Co. v. Allison*, 115 Ga. 635, (42 S. E. 15); *Newhall v. Appleton*, 102 N. Y. 133, (6 N. E. 120). And in the absence of statute the rule is not otherwise where the person making the memoranda has since died. *Luke v. Koenen*, 120 Iowa, 103; *Kellogg v. Webster*, *supra*; *Avery v. Avery*, 49 Ala. 193. Numerous decisions hold that memoranda or entries of many items which are verified by a witness having knowledge thereof may be received in evidence, not as evidence apart from the oral testimony, but in connection therewith as memoranda made at the time and verified as correct. *State v. Brady*, 100 Iowa, 195; *Curtis v. Bradley*, 65 Conn. 99, (31 Atl. 591, 28 L. R. A. 143, 48 Am. St. Rep. 177). Of course, there are exceptions as the admissibility of entries of notaries and bank officials in matters of protest, presentation, and the like of negotiable instruments. *Nicholls v. Webb*, 8 Wheat. 326, (5 L. Ed. 628); *Welsh v. Barrett*, 15 Mass. 380. And possibly of the record of the movement of trains made by a train dispatcher. *Donovan v. Ry.*, 158 Mass. 450, (33 N. E. 583). But some courts hold that even train sheets, to be admissible, must be verified by witnesses having knowledge of the facts. *Bronson v. Leach*, 74 Mich. 713, (42 N. W. 174); *Pittsburg Co. v. Noel*, 77 Ind. 110; *Railroad v. Cunningham*, 39 Ohio St. 327. And some cases are quoted and relied upon by appellant where memoranda made by some one not connected with or interested in the controversy are held admissible.

It is enough to say that the memoranda in question are not within any of these classes, and, if admissible at all, this is by virtue of section 4622 of the Code, which provides that: "The entries and other writings of a person deceased, who was in a position to know the facts therein stated,

<sup>3</sup> SAME: documentary evidence.

made at or near the time of the transaction, are presumptive evidence of such facts, when the entry was made against the interest of the person so making it, or when made in a professional capacity or in the ordinary course of professional conduct, or when made in the performance of a duty especially enjoined by law." The contention of appellant is that the entries were either made in a "professional capacity," or in the ordinary course of "professional conduct." If so, then a recording agent of a fire insurance company must be regarded as a professional man. He is an employee of the insurer and not of the insured, and all exacted of him is that he act with fidelity in negotiating as the representative of his principal with those desiring to obtain insurance on their property. Undoubtedly such agency is an occupation or vocation, but we do not regard it professional in any sense. Indeed, insurance has been construed to be a commodity, *Beechley v. Mulville*, 102 Iowa, 602, though issuing a policy is said not to be a transaction in interstate commerce, *Hooper v. California*, 155 U. S. 648, (15 Sup. Ct. 207, 39 L. Ed. 297). A policy of insurance is merely a contract to indemnify against loss by fire entered into between the insurer and the insured for a consideration; the policy coming to the recording agent in printed form. His duties are to fill out the blanks, countersign and report to the company what he has done, and make memoranda thereof in his register. Aside from this, he may solicit business and examine the property to be insured. But all this requires no special skill or learning and is in no sense professional within the accepted meaning of that word. "Professional" is that which pertains to a profession, and Webster's New International Dictionary defines "profession" as "that of which one professes knowledge; the occupation if not purely commercial, mechanical, agricultural, or the like to which one devotes oneself; a calling in which one professes to have acquired some special knowledge used by way either

of instructing, guiding or advising others or of serving them in some art; calling; vocation; employment; as, the profession of arms; the profession of chemist." The Standard Dictionary: "An occupation that properly involves a liberal education or its equivalent and mental rather than manual labor; especially one of the three learned professions. (2) Hence, any calling or occupation involving special mental and other attainments or special discipline, as editing, acting, engineering, authorship." The Century Dictionary: "The calling or occupation which one professes to understand and to follow; vocation; specifically, a vocation in which a professed knowledge of some department of science or learning is used by its practical application to affairs of others, either in advising, guiding, or teaching them, or in serving their interests or welfare in the practice of an art founded on it. Formerly theology, law and medicine were specifically known as the professions; but, as the applications of science and learning are extended to other departments of affairs, other vocations also receive the name. The word implies professed attainments in special knowledge, as distinguished from mere skill; a practical dealing with affairs, as distinguished from mere study or investigation; and an application of such knowledge to uses for others as a vocation, as distinguished from its pursuit for one's own purposes."

It is apparent from these definitions that, to constitute a profession, something more than a mere employment or vocation is essential; the employment or vocation must be such as exacts the use or application of special learning or attainments of some kind, and this seems to be the conclusion of the courts. Thus a chemist is a person belonging to a recognized profession. *United State v. Laws*, 163 U. S. 258, (16 Sup. Ct. 998, 41 L. Ed. 151). So is a consulting engineer. *Ericsson v. Brown*, 38 Barb. (N. Y.) 390. See *Commissioner v. Reynolds*, 7 Watts & S. (Pa.)

329. A building contractor is not. *In re Whetmore*, 29 Fed. Cas. 921. Nor is a milliner a "professional artist" within the act of Congress prohibiting the immigration of aliens under contract to perform labor. *United States v. Thompson*, (C. C.) 41 Fed. 28. One who operates a real estate agency is not engaged in a professional employment. *Pennock v. Fuller*, 41 Mich. 153, (2 N. W. 176, 32 Am. Rep. 148), where the court said: "Professional employment can only relate to some of those occupations universally classed as professions, the general duties and character of which courts must be expected to understand judicially. Real estate agencies are no more professions than any other business agencies. A commission merchant, or an agent for the sale of any particular kind of personal property, acts in an analogous capacity. Any one can assume and lay down such business at pleasure, and any one can conduct it in his own way, on such terms and conditions as he sees fit to adopt. There is nothing in our laws which would enable any court to draw a line between such business agencies. They are not classed as professions by popular usage or by law." Nor is a sewing machine agent so engaged. *People v. McAllister*, 19 Mich. 215. The renting of tolls is not a profession or trade. *Bellanmy v. Burch*, 16 Mees & W. 590. Debts due for board to a hotel keeper are not professional earnings. *Youst v. Willis*, 5 Okla. 170, (49 Pac. 56). See *Roth v. Boies*, 139 Iowa, 253; *Commonwealth v. Fidler*, 147 Pa. 288, (23 Atl. 568, 15 L. R. A. 205). In *State v. Hunt*, 129 N. C. 686, (40 S. E. 216, 85 Am. St. Rep. 758), Douglass, J., expressed the opinion that procuring laborers to accept employment in another state by an emigrant agent is a profession; but this does not seem to have been essential to the decision, and the other judges expressed no opinion on the point. In *Betz v. Maier*, 12 Texas Civ. App. 219, (33 S. W. 710), the Texas Court of Civil Appeals held that, within the exemption laws, an insurance agent should be regarded

as engaged in a trade, but expressed no opinion as to whether he should be regarded as engaged in a profession. Fire insurance agents are not spoken of, in common parlance, as professional men, nor is their work to be classed as professional. It follows that the memoranda in the policy register can not be said to have been made in a professional capacity nor in the course of professional conduct.

In *Commonwealth v. Smith*, 151 Mass. 491, (24 N. E. 677), the court merely held that the memoranda in the policy register, supplemented by oral testimony of the agent, was admissible notwithstanding the existence of other evidence alleged to be of better quality. The ruling in *Roberts v. Rice*, 69 N. H. 472, (45 Atl. 237), was on the theory that the entries in the policy register were made by a third person since deceased. An insurance company necessarily acts through agents, and here the action is between the original parties, one of whom is the plaintiff and the other the company for whom the agent acted in the very matters in controversy. Clearly enough, such entries were in the nature of self-serving declarations, and, when not verified by a witness knowing the facts, were not admissible in evidence.

III. The policy to which the lightning clause was attached stipulated that: "If a building or any part thereof fall, except as the result of fire, all insurance by this policy on such building or its contents shall immediately cease." Counsel contend that, as the lightning clause is subject to the terms and conditions of the policy, defendant is not liable, for that the injury occurred after the walls fell. The evident design of that clause was to obviate liability for loss by fire consequent upon or subsequent to the falling of the building insured, and we are referred to several cases deciding that in that event there is no liability under such a policy. *Foster v. Ins. Co.*, 143 Fed. 307, (74 C. C. A. 445); *Kiesel v. Ins. Co.*, 88 Fed. 243, (31 C. C. A. 515);

4 SAME: loss  
from light-  
ning: policy  
exceptions.

Nelson v. Ins. Co., 181 N. Y. 472, (74 N. E. 421). Possibly all insurance under the lightning clause except as a result of lightning would have ceased upon the falling of the building, and this would seem a fair interpretation of the two clauses read together. Surely, it could not have been intended in stipulating indemnity for loss by lightning and at the same time to eliminate the natural consequences of a stroke of lightning. The clause quoted has reference to the falling of a building consequent of causes other than those insured against, and the lightning clause is subject to the condition as so construed. See *Haws v. Ins. Ass'n*, 114 Pa. 431 (7 Atl. 159). Moreover, the walls in falling, precipitated the goods of insured in the water and debris, and no time appears to have elapsed between the falling of the wall and the injury upon which the claim of damages is predicated. In any event, then, the damages are within the terms of the contract.

IV. If a lightning clause were attached to the policy covering plaintiff's goods, it is conceded to have been in words following: "This policy shall cover any direct loss or damage caused by the lightning (meaning thereby the commonly accepted use of the term lightning, and in no case to include loss or damage by cyclone, tornado or windstorm), not exceeding the sum insured, nor the interest of the insured in the property, and subject in all other respects to the terms and conditions of this policy." Appellant contends that, even though the wall was struck by lightning and by its fall the goods were precipitated into the debris and water, the damage from these was not the "direct loss or damage caused by lightning," relying upon several cases, none of which, as we think, support the contention. In *Warmcastle v. Insurance Co.*, 201 Pa. 302, (50 Atl. 941), the policy assumed liability for "direct loss from lightning in no case to include loss or damage by cyclone, tornado,

5 SAME: loss  
from light-  
ning: direct  
damage.

or windstorm," and the court recognized that, "as a general principle, the insurer is liable for all loss which results from or can be fairly attributed to the peril insured against," but proceeded to say that liability might be limited, and in that case liability for damage caused by cyclone, tornado and windstorm was expressly excluded, and, though it might be difficult to say the amount of damages occasioned by the wind, plaintiff could only recover for that occasioned by lightning. In *Ins. Co. v. Nelson*, 64 Kan. 115, (67 Pac. 440), the policy stipulated for indemnity against "all such immediate loss or damage sustained by the injured as may occur by tornadoes, cyclones and windstorms," and provided that the insurer should not be liable for any loss or damage occasioned by hail and water. Windows were broken by hail, and damages were denied because of the exception noted. See, also, *Beakes v. Ins. Co.*, 143 N. Y. 402, (38 N. E. 453, 26 L. R. A. 267); *German Fire Ins. Co. v. Roost*, 55 Ohio St. 581, (45 N. E. 1097, 36 L. R. A. 236, 60 Am. St. Rep. 711); *Vorse v. Ins. Co.*, 119 Iowa, 555. It will be observed that the decisions turn on an exception contained in the policies which may have found its way there because of the conclusion in *Spensley v. Ins. Co.*, 54 Wis. 493, (11 N. W. 894), holding that, in the absence of any exceptions, where injury is caused by windstorm or cyclone accompanied by lightning, the issue of whether the electric storm is the cause of the injury to property covered by a lightning clause attached to the insurance policy was for the jury. No argument would seem to be necessary in this case to demonstrate that no efficient cause intervened between the stroke of lightning and the damage to the goods from coming in contact with the debris and water of the flood. Certainly it might have been found that the fall of the building was caused by the stroke of lightning, and as a natural sequence that the goods were precipitated in the water and debris. Courts have held that the fall of

a building directly resulting from an ordinary fire is within the terms of the policy against fire, *Ermentrout v. Ins. Co.*, 63 Minn. 305, (65 N. W. 635, 30 L. R. A. 346, 56 Am. St. Rep. 481); and that injury to another building from the fall of one burned, may be within the policy covering the former, *Russell v. Ins. Co.*, 100 Minn. 538, (111 N. W. 400, 10 L. R. A. [N. S.] 326); and that injury resulting from water or chemicals in extinguishing the fire is a direct result of the fire and covered by the policy. *Geisek v. Ins. Co.*, 19 La. Ann. 297; *Lewis v. Ins. Co.*, 10 Gray (Mass.) 159; *Whitehurst v. Ins. Co.*, 51 N. C. 352; *Cohn v. Ins. Co.*, 96 Mo. App. 315, (70 S. W. 259). Loss by theft consequent upon the confusion attending a fire or injury to goods in their removal from the building is regarded as a direct consequence of the fire. *Newark v. Ins. Co.*, 30 Mo. 160, (77 Am. Dec. 608); *Mitchell v. Ins. Co.*, 49 Me. 200. In *Hapeman v. Ins. Co.*, 126 Mich. 191, (85 N. W. 454, 86 Am. St. Rep. 535), horses, insured against lightning, were in a barn which was struck by lightning and were burned by the fire which followed, and the insurer was held liable. In the light of these decisions, it seems unnecessary to add that the injury to the goods from water and debris into which they were precipitated by the falling of the wall, was the direct and natural consequence of the stroke of lightning. The judgment is *affirmed*.

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STATE OF IOWA V. J. A. HARRIS, ALIAS ARTHUR JOHNSON,  
Appellant.

**Criminal law: EVIDENCE OF OTHER CRIMES: IDENTITY OF ACCUSED.**

- I While as a general rule it is not permissible to show that a defendant has committed other wholly independent crimes from that for which he is being tried, still evidence which tends to identify him as the person who committed the crime charged is competent, although it may incidentally tend to connect him with another and independent crime.

**Same:** EXCLUSION OF REBUTTAL EVIDENCE: PREJUDICE. Where the state  
2 has inquired into other distinct crimes for the purpose of identifying the defendant with the crime charged, the defendant should be permitted to introduce such evidence as will tend to rebut the inferences to be drawn for the state's evidence. The exclusion of the evidence of defendant in this case along that line is held to have been prejudicial.

**Same:** SCOPE OF CROSS-EXAMINATION. The testimony of defendant  
3 that he had sought employment in a certain city did not justify the court in permitting the state to show by his cross-examination that other like crimes were committed at that place at about the time he sought the employment.

**Same:** EVIDENCE: REASONABLE DOUBT: INSTRUCTION. To justify con-  
4 viction every essential element of the crime charged must be proven beyond a reasonable doubt, but it is not necessary that such proof consist of independent evidence separate and apart from the other evidence in the case. The instruction in this case is held to so state, though not clearly.

**Burglary:** RECENT POSSESSION OF STOLEN PROPERTY: INSTRUCTION.  
5 Where the evidence tended to show that property stolen from the house defendant was accused of burglarizing was in his possession a short time after the burglary, an instruction on the subject of recent possession of stolen property was proper.

**Same:** OTHER LIKE CRIMES: INSTRUCTION. An instruction in this  
6 case regarding evidence of other like crimes, the evident intent of which was to tell the jury that the same should not be considered for the purpose of showing that the premises in question were unlawfully entered, but simply to identify defendant as the person entering it, was proper.

*Appeal from Linn District Court.*—HON. MILO P. SMITH,  
Judge.

THURSDAY, JANUARY 11, 1912.

THE defendant was convicted of breaking and entering an inhabited dwelling in the nighttime, and appeals.—  
*Reversed and remanded.*

*Barnes & Chamberlain*, for appellant.

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*George Cosson*, Attorney-General, and *Henry E. Sampson*, Special Counsel, for the State.

SHERWIN, J.—I. The defendant was tried on an indictment charging him with breaking and entering the home of Charles F. Luburger, in the nighttime, while armed with a dangerous weapon. The burglary was committed in the early part of the 22d day of May, and the defendant was identified as the burglar by two witnesses who saw him while he was in the house. A watch was taken from the Luburger home, and this was afterwards found with property that was taken from the home of Isaac B. Smith during the night of May 19th, and with property that was taken from the home of Father Donnelly on the night of May 23d, and the evidence tended to show that all of said property had recently been in the possession of the defendant, and was, in fact, under his control at the time of his arrest for this crime. The state was permitted to show that some of the articles so found were taken from these other homes, and members of the Smith family were permitted to testify that the defendant was the man who entered their home and took the property therefrom, and that he was at that time armed with a dangerous weapon. This evidence was competent, we think, for the purpose of identifying the defendant as the man who committed the crime charged. While it is the general rule that it is not competent to prove that the defendant has committed another crime wholly independent of that for which he is being tried, there are exceptions to this rule, and one of the exceptions is that evidence, which tends to identify the defendant as the person who committed the crime with which he is charged, is competent, although it may incidentally tend to prove that he has committed another and independent crime. *State v.*

1 CRIMINAL LAW:  
evidence of  
other crimes:  
identity of  
defendant.

• *Kepper*, 65 Iowa, 745; *State v. Wackernagel*, 118 Iowa, 12; 12 Cyc. 407, and cases cited in note.

As we have already seen, the watch taken from the Luburger home was found with property that had been taken from the Smith and Donnelly homes. All of this

property was located and found in the following way: One George Fisher was a prisoner in jail with the defendant, and the

defendant made and gave to Fisher a written diagram of the location of the property, which indicated certain houses where it would be found, and, with the aid of this diagram, the property was located and obtained by the officers. Fisher also testified that the defendant told him that some of the property so hidden was taken by him from the Smith home. The defendant offered the testimony of both Smith and Father Donnelly to show that other property than that found by the officers where the defendant had indicated in his diagram was stolen from their houses at the same time, and that said property was found in the personal possession of another not in any way shown to have been connected with the defendant's operations, and to show, further, that Father Donnelly was able to identify the man in whose possession it was so found. The state had gone into the Smith and Donnelly burglaries for the express purpose, as claimed, of identifying the defendant as the man who was in the Luburger home, and this result was to be accomplished in part by showing that the defendant had had in his possession property which was taken from the Smith and Donnelly houses. The defendant was clearly entitled to rebut the inferences to be drawn from the state's evidence along this line, and it was in our judgment prejudicial to exclude it.

It may be true that the evidence other than this was sufficient to warrant and sustain a conviction. But the defendant was entitled to a fair and impartial trial, and

to have received all evidence which he had that would tend to show the falsity of the state's claim. Neither the trial court nor this court can say that such evidence was of little consequence, and would not have been given consideration by the jury. It is the jury that is to determine the weight of such evidence, and, when the defendant is denied the right to present his case to the jury, he has not received the fair and impartial trial guaranteed him by the law.

II. The defendant called a witness to prove that he had sought employment with one of the railroads entering Cedar Rapids, and, over the defendant's objections, the

3 SAME: scope  
of cross-ex-  
amination.

state was permitted to show on cross-examination that burglaries were committed in the city at about that time. The broad discretion of trial courts in the cross-examination of witnesses can not justify this action of the court. The examination was evidently intended to prejudice the jury against the defendant, and it should not have been allowed. It may not have been actually prejudicial, because the jury then knew of the burglaries that had been otherwise shown during the trial, but it was an improper examination nevertheless, and should not have been permitted.

III. The court instructed that it was not necessary to find every essential fact proven beyond a reasonable doubt; that, if from a consideration of the entire case,

4 SAME: evi-  
dence: reason-  
able doubt:  
instruction.

the jury was satisfied beyond a reasonable doubt, it was sufficient. Where the state relies on circumstantial evidence alone to secure a conviction, it is the rule that every essential or material fact constituting the offense must be proven beyond a reasonable doubt. *State v. Kimes*, 145 Iowa, 346. And we know of no different rule in other cases. It is undoubtedly true that it is not necessary to so prove every material fact by independent evidence. Some essential fact, standing alone, may not be found proven beyond a

reasonable doubt, but, when considered in the light of the other evidence, it may derive such support therefrom as to exclude all doubt of its existence, and, if that was what the court intended to say, the instruction would not be erroneous. We are inclined to the view that the instruction was so intended by the court, but it is not clear. *State v. Cohen*, 108 Iowa, 208; *State v. Ottley*, 147 Iowa, 329.

IV. An instruction on the effect of the recent possession of stolen property was proper in this case, for the reason that the evidence tended to show that the watch stolen from the Luburger home was in the possession of the defendant within a short time after the crime was committed. The jury was justified in finding that the defendant had all of the property found by the officers in his possession before his arrest. His own admission to Fisher that he had taken the Smith property which was found with this watch would alone warrant such finding.

5 BURGLARY: recent possession of stolen property: instruction.

V. The court instructed that evidence of other burglaries was admitted, "not for the purpose of showing that the crime under consideration was committed, but it creates and raises a presumption that the same person committed all of them." The evident intent of this instruction was to tell the jury that such evidence could not be considered for the purpose of showing that the Luburger house had been unlawfully entered, but could be considered for the purpose of identifying the defendant as the man who so entered the Luburger house, and, so construed, the instruction was not erroneous. Other errors are complained of, but some of them are of minor importance and others are not likely to be repeated on a retrial of the case, so we need not further notice them. For the errors pointed out, the judgment is reversed and the case remanded.—*Reversed and remanded.*

6 SAME: other like crimes: instruction.

**INDEPENDENT SCHOOL DISTRICT NO. 8 OF LIBERTY TOWNSHIP, in MARSHALL COUNTY, et al., Appellant, v. INDEPENDENT SCHOOL DISTRICT OF CLEMONS, in MINERVA TOWNSHIP, in MARSHALL COUNTY, et al.**

**Schools:** ORGANIZATION: DESCRIPTION OF TERRITORY: PETITION. Petitions for the organization of a school district describing the proposed new district as comprising all of an incorporated town and the school corporation of the town, subdistricts and independent districts were sufficient, under the provisions of Code Supp. 2794, providing for the organization of an independent district consisting of contiguous territory, to include not only the territory of the incorporated town but also that of the independent district in which the town was situated.

**Same:** NOTICE OF ELECTION. Notice of an election pursuant to such petitions describing the territory as including all of the incorporated town, independent districts and subdistricts, all contiguous territory to the independent district of the town, was a sufficient notice of an election to vote on the proposition to create an independent district comprising the original independent district and adjacent territory.

**Same:** BALLOT. The ballot used in this case is held to sufficiently describe the territory so as to include the original independent district as well as contiguous territory.

**Same:** NOTICE OF ELECTION: POSTING: PRESUMPTION. Where there is nothing in the evidence to show that a sufficient number of election notices were not posted in the territory proposed to be organized into a school district the court will presume on appeal that this was done.

**Same:** NOTICES OF ELECTION: SUFFICIENCY. Where the notices of election were signed by the members of the board to whom the petition for the organization of an independent district was presented, it was sufficient without certification by the secretary of the board; so that the addition of the name of one purporting to act as secretary, but not such in fact, did not render the notices void.

**Same:** ELECTIONS: POLLING PLACES. The fact that separate elections were held in each of the territorial divisions proposed to be

consolidated instead of a single election in the district to which the petition was presented, as contemplated by statute, did not invalidate the organization of the district, where it appeared that a majority of all the electors so voting were in favor of the organization; in the absence of any showing of fraud or that the result would have been different had the ballots all been cast at a common voting place.

*Appeal from Marshall District Court.*—HON. CLARENCE NICHOLS, Judge.

THURSDAY, JANUARY 11, 1912.

THIS action, instituted by a school corporation which formerly existed and still claims legal existence, represented by certain pretended officers and joined in by certain taxpayers residing in the territory of such pretended school corporation, was brought for the purpose of securing an injunction against a pretended school corporation and its alleged officers, preventing them from proceeding further or asserting any authority under an attempted consolidation of territory, creating the pretended corporation and merging into it the plaintiff corporation. The trial court, after hearing evidence on an application for a preliminary injunction, refused such application, and the plaintiffs appeal.—*Affirmed.*

*Cummings & Mote, J. M. Whitaker, and Carney & Carney*, for appellants.

*C. H. Van Law*, for appellees.

McCLAIN, J.—Although the appeal here presented is from the refusal of a preliminary injunction, it is submitted on both sides with the understanding that the merits of the case may be finally disposed of by determining the correctness of the findings in law and fact, made of record by the trial judge in his ruling, by which he refused to

grant a preliminary injunction; and the case will be treated, therefore, as though it were now before this court on appeal from a final decree, denying to plaintiffs the relief asked.

In May, 1911, there existed in Marshall county, a school corporation, known as the Independent School District of Clemons, comprising the territory included within the corporate limits of that town and certain adjacent territory, all within Minerva township. During that month, proceedings were instituted, the general object of which was to create a new independent district, to include the independent school corporation of Clemons and certain described contiguous territory, which contiguous territory constituted subdistricts, numbered 1 and 2, of the school township of Minerva, and independent districts, numbered 7 and 8, of Liberty township, which adjoins Minerva township on the north. These proceedings were commenced in attempted compliance with the provisions of Code Supp. 1907, section 2794, which, so far as material for present purposes, provides that, upon the written petition of any ten voters of a city or town to the board of the school corporation in which the city or town is situated, such board shall establish the boundaries of a proposed independent district, including therein all of the territory of the city or town and such contiguous territory as is authorized by written petition of a majority of the resident electors of the contiguous territory proposed to be included, which contiguous territory may be in adjoining school corporations, and give notices of a meeting, at which all voters upon the territory included within the contemplated district shall be allowed to vote by ballot for or against such proposed organization. It is further provided that the voters residing in the territory outside the city or town shall be entitled to vote separately upon the proposition for the formation of such new district, if a petition requesting such separate vote is presented, and that, if a

majority of the votes cast by voters in the outside territory is cast against the inclusion of such territory, then the proposed independent district shall not be formed.

The general contention for the plaintiffs is that the proceedings for the establishment of the proposed independent district were so irregular and defective that such district was not in fact created, and does not now exist as a school corporation, and that therefore the plaintiff corporation has not been merged into it, and still has a legal existence, and that any attempt on the part of the proposed corporation or its officers to exercise authority will be void, and should be restrained.

It may be conceded at the outset that in the various steps taken in the attempted formation of the proposed corporation there are many irregularities, and it would serve no purpose to reproduce from the record in full the various petitions, notices, and orders in which such irregularities appear. We shall content ourselves with discussing briefly the merits of the complaints made as to errors and irregularities which, it is contended, were of such character as to render the attempted formation of the proposed district nugatory.

I. It is to be borne in mind that the attempt was to include in the proposed district the territory of the existing independent school district of Clemons, which district included within its limits, not only the incorporated town of Clemons, but also territory adjacent thereto, and to add to such existing district, in the formation of the proposed district, territory contiguous to that independent district, then included within the limits of other school corporations. It is not claimed that the proposed district might not have been properly created under the statutory provisions above referred to had the proper steps been taken. The principal contention for appellants is that in the petitions, notices, and orders the existing independent school district of Clemons was not sufficiently specified, described,

or referred to, and that the specifications and descriptions of the territory to be included in the proposed district designated only the town of Clemons and the territory contiguous to the independent district of Clemons, so that the proposed corporation did not include the territory of the independent district of Clemons, which was not within the town limits. If this contention is well founded, then the proposed district consisted of territory within the corporate limits of the town of Clemons and other territory not adjacent thereto. Such a proposed district could not be created under the statute.

The petitions presented to the board of directors of the independent school corporation of Clemons for the establishment of the proposed independent district were signed,

1 **SCHOOLS: or-  
ganization:  
description of  
territory:  
petition.**

respectively, by the necessary number of electors residing within the town of Clemons, the two subdistricts of the school township of Minerva, and the two independent districts of Liberty township; and the complaint with reference to the sufficiency of these petitions is that they do not describe a proposed district including all the territory of the existing independent district of Clemons, but only that portion of the independent district of Clemons which was within the corporate limits of the town of Clemons. In the petition signed by legal voters of the town of Clemons, the proposed district is described as including "all of the town of Clemons," while in the other petitions the proposed district is described as including "the school corporation of the town of Clemons." Clearly the reference to the "school corporation of the town of Clemons" was sufficient to designate the existing independent school district of Clemons, composed of the territory of the town and adjacent territory. There was no other school corporation of the town of Clemons. The petition of the voters of the town of Clemons is more ambiguous, but taking it as a whole, and assuming that the

petitioners were seeking to secure some lawful, rather than some unlawful and unauthorized, action of the board of directors, we must hold that the purpose was to ask for the creation of a proposed district which should include, not only the territory of the town of Clemons, but also the territory of the independent district in which it was situated; for the petitioners ask the creation of a district which shall include the town of Clemons and the other described territory; "all being contiguous territory to the independent school district" of Clemons.

The board of directors to which the petitions already referred to were addressed caused notices to be posted in each of the territorial divisions proposed to be incorporated into the new district, addressed to the legal voters therein, advising them of a meeting of the electors residing in each of the named territorial divisions, at the school building in each said independent districts and subdistricts, for the formation of a new independent district, designated as including "all of the town of Clemons and all of the independent districts numbered seven and eight of Liberty township, . . . and all of the subdistricts numbered one and two of the school township of Minerva; . . . all being contiguous territory to the independent school district of and within the town of Clemons." The possible ambiguity in this notice is, as in the case of one of the petitions already referred to, that it does not specifically include in the designation of the proposed district the territory of the existing independent district of Clemons outside of the town limits. But if that territory was not included in the description used, then the whole proceeding was nugatory; and we are certainly justified in assuming that the board were intending to do a lawful thing, and not something that was entirely unauthorized and futile. It is plain that the whole difficulty with this notice, in respect to the description of the territory to be included in the proposed district, arose out

<sup>2</sup> SAME: notice  
of election.

of the erroneous assumption on the part of the board that the independent district of Clemons included no other territory than that within the limits of the town of Clemons, and that the contiguous territory intended to be incorporated with the existing independent district was also contiguous to the town. Such erroneous assumption being patent on the face of the notice, we have no difficulty in discovering from the notice itself that the intention of the board was, and must have been understood by the voters to be, to call an election to vote upon the proposition of creating a new independent district, which should include all of the existing independent district of Clemons and certain described adjacent territory.

At the election held in pursuance of the notice above referred to, the ballot used was in this language: "Shall there be formed an independent school district to include  
 3 SAME: ballot. all the town of Clemons and all of the independent districts numbered seven and eight of Liberty township, . . . and all of the subdistricts numbered one and two of the school township of Minerva, . . . all being contiguous territory to the independent school district of and within the town of Clemons, . . . and the said districts consolidated thereby?" Those voters who indicated an affirmative choice in the use of this ballot (by marking with a cross in the proper place) certainly intended to vote for a consolidated district embracing, not only the four divisions sufficiently described, but also the independent school district of Clemons, to which the other territory is described as contiguous; and we see no reason for not giving to the ballot an interpretation which would carry out the plain intent of the voters.

In certain proceedings of the board, relating to the giving of notice and the holding of elections, there were possible ambiguities similar to those already referred to as existing in one of the petitions and in the notices and in the ballot, but for reasons already indicated we must hold

these resolutions to have been sufficient for the purpose for which they were plainly intended.

II. There is a controversy between counsel on the two sides of this case, apparently arising for the first time in this court, as to the sufficiency of the notice given, in that, as contended for appellants, it does not appear that five copies of the notice were posted in each of the territorial divisions which were to be incorporated into the proposed district. Assuming, without further discussion, that it was necessary, under other statutory provisions, to post five copies of the notice in each territorial division, it is sufficient to say that there is nothing in the record to indicate that this requirement was not complied with. The entire controversy arises out of an ambiguity in a stipulation found in the record, that the notice therein set out, addressed to the legal voters residing within subdistrict No. 1 of the school township of Minerva, "was posted in subdistrict No. 1 of the school district of Minerva, as to the election in question. It is further agreed that a like notice, as to the body and signatures thereto, was posted in each of the other subdistricts and independent districts, being changed, however, in the address at the top of the notice, so as to apply to each of the independent districts and subdistricts in which it was posted." If a proper posting of the notices referred to involved the posting of five copies of each, then we must assume that five copies were posted; for there is nothing in the stipulation to the contrary. Only one notice was required, even if the posting of five copies of such notice was necessary in each territorial division.

Some complaint is also made as to these notices, because they were signed by different persons as "secretary."

All of them purported to be signed by the members of the board of the independent district of Clemons, and the certification by some one, as secretary, was plainly not essential, under the

4 SAME: notice  
of election:  
posting: pre-  
sumption.

5 SAME: notices  
of election:  
sufficiency.

statute, to their validity. The record does not disclose what officer actually posted the notices, and it must be presumed that they were posted by the proper officer, whoever he may have been. The addition to the notice of the name of some one, purporting to act as secretary of the board, who was not in fact secretary, could not render the notice itself invalid.

III. Perhaps the most serious objection to the validity of the formation of the proposed district is that five different elections were held in the territorial divisions

<sup>6</sup> SAME: elections: polling places. proposed to be consolidated, instead of one election in the town of Clemons, at which

the electors from all the five territorial divisions might cast their ballots, as the statute already referred to plainly contemplates. But it is conceded that a majority of all the electors who would have been entitled to vote at the one voting place thus designated did cast ballots in favor of the proposed consolidation. There is no provision in the statute requiring an affirmative vote of a majority of the electors voting from any one of the territorial divisions to be incorporated into the proposed district. We are justified in assuming, therefore, that if a proper election had been held in the town of Clemons, there would have been a majority vote in favor of the creation of the proposed district. While it is true that the place of holding an election is an important matter, nevertheless there is ample authority for the conclusion that, in the absence of anything to indicate fraud, or that a different result was reached from that which would have been reached if the election had been held at the authorized place, the irregularity will not defeat the end sought to be attained by the holding of such an election. *Dishon v. Smith*, 10 Iowa, 212; *Bowers v. Smith*, 111 Mo. 45, (20 S. W. 101, 16 L. R. A. 754, 33 Am. St. Rep. 491); *Wildman v. Anderson*, 17 Kan. 344; *Stemper v. Higgins*, 38 Minn. 222, (37 N. W. 95); *Whitcomb v. Chase*, 83

Neb. 360, (119 N. W. 673); *Molyneaux v. Molyneaux*, 130 Iowa, 100.

It is argued that the statute contemplates a meeting place and a meeting thereat of the electors, at which a discussion may be had as to the merits of the proposition, in which all may participate. No doubt it is true that in our school law, as originally framed, such a meeting was contemplated, but in the statutory provisions for meetings or elections to be held, at which the electors are to express their choice by ballot, this theory is evidently abandoned. As the qualified voters within the five territorial divisions which were to be incorporated into the proposed district had a reasonable opportunity, in pursuance of proper notice, to cast their ballots for or against the proposed consolidation, and it affirmatively appears that a majority of those entitled to vote did cast their ballots in favor of such consolidation, we would not be justified in announcing a conclusion which should nullify their expressed preference. As somewhat in point, see *Kinney v. Howard*, 133 Iowa, 94; *Calahan v. Handsaker*, 133 Iowa, 622.

Other irregularities are pointed out in argument, but none of them, in our judgment, is sufficient in itself, nor are they sufficient collectively, to warrant the setting aside of the plain expression of the will of the electors with reference to a proposition which the statute directs shall be submitted to their decision.—*Affirmed*.

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Estate of ANNA L. RABBETT, deceased, M. J. RABBETT, Individually and as Administrator, Appellant, v. JOHANNA CONNOLLY, ELIZA CONNOLLY and ELIZABETH HEARTY, Appellees.

**Estates of decedents: CLAIMS: TEMPORARY ADMINISTRATION.** A temporary administrator appointed to investigate and report upon a claim of the regular administrator against the estate has no authority to allow more than the amount claimed.

**Same: CLAIMS: ALLOWANCE: SUBSEQUENT CORRECTION.** The allowance by the court of a claim against an estate, while not a judgment is attended by the same presumptions, and ordinarily should be attacked in the same manner. But the probate court has a large discretion and control over the settlement of estates, and at any time before the final discharge of an executor or administrator may correct his accounts and settlements for mistake or fraud, including the erroneous account of a special administrator.

**Same: ERRONEOUS ALLOWANCE OF CLAIMS: REMEDY: JURISDICTION.**

3 Where the heirs of a decedent had no notice of the proceedings for the allowance of a claim in favor of the general administrator, and were not represented and did not appear before the special administrator in resistance of the claim, and its allowance was manifestly erroneous, a motion to set aside the allowance made pending administration was timely, and was a direct attack justifying relief. And the motion was properly supported by affidavits of the heirs.

**Same: SALE OF REAL ESTATE.** The application of an administrator to  
4 sell real estate should be denied where the decedent's indebtedness has not been ascertained and there is a prima facie showing of sufficient personal assets.

*Appeal from Dubuque District Court.—HON. ROBERT BONSON, Judge.*

THURSDAY, JANUARY 11, 1912.

THE trial court, sitting as a court of probate, made an order setting aside the allowance of a claim to M. J. Rabbett, and he, both in an individual capacity and as administrator of the estate of Anna L. Rabbett, appeals.—*Affirmed.*

*Kenline & Roedell, for appellant.*

*Hurd, Lenehan & Kiesel and Lacy, Brown & Lacy, for appellees.*

DEEMER, J.—Plaintiff is the administrator of the estate of his deceased wife, Anna L. Rabbett. She died intestate and without issue, in June of the year 1907,

possessed of certain real and personal property. Plaintiff, M. J. Rabbett, was appointed administrator of the estate in January of the year 1908. He filed no inventory of the estate, no list of heirs, and no statement of any kind showing the amount of property belonging to the estate. On December 21, 1908, he filed a claim against the estate consisting of the following items:

Cash, paid in 1892 on various contracts for building house and making improvements and repairs .....	\$3,656.88
Cash, paid for city and county taxes, commencing 1893, including 1906 .....	545.68
Cash, paid for repairs and improvements since death of decedent .....	524.05
Cash, paid for funeral and other expenses.....	489.25
<hr/>	
Total .....	\$5,215.86

Thereupon one A. T. Roedell was appointed temporary administrator to examine into and report upon said claim, and to make return of his findings into court. On April 19, 1909, this special administrator filed a report, from which we extract the following: "He therefore states that he has made a full and complete investigation of all matters involved in such inquiry, has examined all vouchers, had witnesses before him duly sworn, went fully into all matters touching the claim of said M. J. Rabbett in relation to the building of the house on premises, the legal title to which was in the decedent, Anna L. Rabbett, payment by him of the city and county taxes, repairs, and improvements made, also funeral and other expenses and from such personal examination reports as follows." On the first item of Rabbett's claim he allowed the sum of \$3,594.30; on the second the sum of \$583.84; on the third, \$598.09; and on the fourth the sum of \$902.50. The findings with reference to the second, third, and fourth items are here reproduced:

(2) I find that from 1892 up to the present time said M. J. Rabbett has paid the city and county taxes on said premises in the total sum of \$583.84.

(3) I find that M. J. Rabbett was authorized by the court herein to take charge of said premises, make repairs, and collect rents, and, in accordance therein, said M. J. Rabbett had made necessary repairs and improvements aggregating \$585.09, for which sum he is entitled to reimbursement from said estate.

(4) I find that M. J. Rabbett has paid out for funeral expenses, cemetery lot and perpetual care, and expenses of last sickness, the sum of \$902.50, for which he is entitled to be reimbursed from said estate.

The total allowance made to claimant was \$5,665.73, and this did not include any items of interest. On April 19, 1909, this report was approved by the court, the temporary administrator was allowed the sum of \$15 for his services, and the claim was established and allowed against the estate to the amount of \$5,665.73. On June 1, 1909, the administrator made application to sell certain real estate of the deceased to pay allowances and claims, including that allowed upon his claim; this application concluding as follows:

That it is necessary for paying off claims against said estate to sell said real estate; that your petitioner is the heaviest claimant, is the widower of decedent, and as such, is entitled to one-half of said estate, said decedent having left no children, has lived on said premises since the house was built thereon by him in 18—, and is desirous of taking care of all claims herein and retaining the legal and equitable title to said premises, and to that end is willing to pay all claims against said estate in full, court costs, and costs of administration, should the court authorize him to make a sale of said premises to himself personally; that, as shown by his claim allowed herein, the same grew largely out of the building of the house on said premises. Wherefore, your petitioner asks the court to enter an order herein empowering and directing him to make a sale of said premises to himself personally, appointing appraisers to

fix the value of same, and prescribing the notice to be fixed in relation thereto.

On June 19, 1909, Johanna Connolly and Eliza Connolly, heirs at law of Anna L. Rabbett, deceased, appeared and filed a motion to set aside the allowance of Rabbett's claim, and to "have said claim heard by the court upon competent proof, and to require the administrator to appear and submit to examination touching the property of said decedent in his hands or under his control, or within his knowledge, upon the following grounds: (1) Because no sufficient account is made of the personal estate of the decedent. (2) That M. J. Rabbett, the administrator of the estate of Anna L. Rabbett, has made application to sell the real estate of decedent to pay a claim made by himself for the sum of \$5,665, which, on its face, should not be charged to decedent's estate. (3) That before such a claim should be allowed by the court, or an allowance made by a special administrator approved, it should appear that the claim was established by competent evidence. The special administrator appointed to examine this claim is not a lawyer or competent to judge of the sufficiency or competency of the evidence submitted in proof of the claim, and does not set forth in his report the evidence upon which the claim was allowed. (4) The administrator should be cited to appear and submit to examination touching the property of the decedent received by him, and its disposition by him, and all property of the decedent of which he had knowledge owned and possessed by her during his marriage with her. And the petitioners refer to the affidavits attached in support of this motion."

This was supported by affidavits showing that deceased at the time of her death, was possessed of certain personal property, and that said administrator, Martin J. Rabbett, had made no accounting of her property received by him as administrator, or of any personal property standing in the name of his wife at the time of her death, and

had made no report showing the disposition of any property belonging to his said wife, or any sufficient showing that there is and was no property of the said Anna L. Rabbett out of which to pay any claims filed against said estate. Later, and before hearing on the motion, these heirs filed an amendment setting forth the following additional grounds: "(5) Said administrator has failed to file any inventory of the property, real or personal, belonging to said estate. (6) Said administrator has failed to account for the personal property belonging to said estate, and consisting of money, security, and the capital stock of the corporation in which the money of the deceased was invested by her. In support of said motion affiants refer to the affidavits attached hereto."

This was supported by an affidavit showing that deceased, at the time of her death, was possessed of certain personal property, that she made the improvements upon the lot from her own funds, and that the house upon the property was erected more than 15 years ago. On June 22, 1909, another heir of the deceased filed an answer to the application to sell real estate and objections to the granting thereof upon the following, among other grounds: "(1) The petition was not filed in time. (2) No sufficient account has been made of the disposition of the personal estate of the deceased. (3) The administrator may not sell the property of the estate of which he is administrator to himself. The sale, even if it should be ordered and made, would be absolutely void, and might be set aside, and therefore ought not to be ordered. (4) A sale of the real property of the estate would not be necessary except to pay a claim made by the administrator himself chiefly for money alleged to have been expended by himself in the improvement of the real estate, which he asks permission to sell, and this claim on its face should not have been allowed against the estate. (5) The administrator has not furnished any sufficient proof that the money which he

claims to have expended and for the expenditure of which he claims reimbursement, was his money." This heir also moved the court to set aside the allowance of the Rabbett claim, and also a motion "to require the said M. J. Rabbett to submit to an examination touching the property of the deceased, and the manner in which he obtained the money which he claims to have expended for said estate and for the deceased, and to require him to present full and sufficient vouchers and receipts for the payment of the sums which he claims to have so expended."

Rabbett filed a motion to strike the affidavits attached to the motions for the reason that they were and are incompetent and irrelevant, and for the further reason that "none of the matters urged in said affidavits in any way affect the claim of said M. J. Rabbett against said estate; neither do they afford any ground upon which to set same aside, require the examination of said administrator or sufficient objection to the sale of the real estate in question." This motion was overruled and exception taken. Thereafter he filed what he called a demurrer to and resistance of the motion to set aside the order based upon many grounds not necessary to be enumerated. This demurrer was overruled, and the objections held insufficient, and Rabbett excepted. Thereupon the matter was heard to the court, resulting in the following order: "It is ordered that the allowance of the claim of Martin J. Rabbett, by the temporary administrator, in the sum of \$5,665.73, and the approval of the report of said administrator, making such allowance, are hereby set aside and annulled, and the reference of said claim to A. T. Roedell as temporary administrator is set aside. And it is further ordered that said claim be heard by and submitted to the court at the next term of this court. It is further ordered that Martin J. Rabbett, administrator, appear for examination touching the property of said Anna L. Rabbett on the 1st day of the next term of this court at 10 o'clock a. m." The

court also refused to rule on the application to sell real estate, placing its refusal upon the ground of the pendency of the Rabbett claim. The appeal is from these various rulings.

The record shows that some of decedent's heirs were and are nonresidents of the state, that none of the heirs had any actual notice of Rabbett's claim, and that none of them appeared in resistance thereto.

It also discloses the fact that the temporary administrator allowed the claimant something like \$450 more than he claimed; that he was allowed for taxes paid after the death of his wife; that he was awarded the sum of \$585.09 for making repairs upon the real estate and for collecting rents after his wife's demise, and another sum for funeral expenses, for cemetery lot and perpetual care thereof, and for the expenses of last sickness of the deceased. The temporary administrator was clearly in error in allowing more than was claimed and in making most of the allowances just referred to. *Burns v. Keas*, 20 Iowa, 16-19; *In re Pennock's Estate*, 122 Iowa, 622.

The real point made for appellant is that the approval by the court of the report of the temporary or special administrator and the allowance of the Rabbett claim is an adjudication binding upon the court and the parties until set aside by direct proceedings, and that such a report and allowance can not be set aside in any event except for fraud, collusion, or mistake, and that there must also be a showing of a meritorious defense to the claim.

It is true that the allowance of a claim by the probate court, while not a judgment, is attended with the same presumptions as a judgment, and should ordinarily be attacked in the same manner. *In re Pennock's Estate*, 122 Iowa, 624, and cases cited. But it is also true that the probate court has large control over an executor or administrator,

1 ESTATES OF  
DECEDENTS:  
claims: tem-  
porary admin-  
istration.

2 SAME: claims:  
allowance:  
subsequent  
correction.

and may, at any time before his discharge, correct his accounts and settlements for mistake or fraud. Objections to a claim or a motion to set aside an allowance thereof is a direct attack, and the only other question at issue is, May such an allowance be set aside for mistake or because it is erroneous, unjust, or inequitable? For the purposes of the case, it must be assumed that there is a defense in whole or in part to the claim, that the allowance was erroneous, and under the showing, unjust. But there is no direct charge of fraud or collusion. In *Dessaint v. Foster*, 72 Iowa, 639, it is said: "It is true that the order allowing the claim is not technically a judgment (*Foteaux v. Lepage*, 6 Iowa, 123; *Voorhies v. Eubank*, 7 Iowa, 274; *Little v. Sinnett*, 7 Iowa, 324; *Smith v. Shawhan*, 37 Iowa, 533), and we do not hold that the application for its vacation is governed by the rules which apply when an ordinary judgment is sought to be set aside, but is an adjudication. It is a determination by the court, after hearing the evidence, that plaintiff's claim is just and valid (*Voorhies v. Eubank*, *supra*), and it ought not to be disturbed without some showing that the administrator has a valid defense against it." In *Hendron v. Kinner*, 110 Iowa, 549, we said: "The order of the court allowing the claim was in the nature of an adjudication. The plaintiffs were not entitled to have it set aside and to have a retrial as to the validity of the claim as a matter of right, but were required to show some valid ground for setting it aside (see *Dessiant v. Foster*, 72 Iowa, 639; *Kows v. Mowery*, 57 Iowa, 20; *Cowins v. Tool*, 36 Iowa, 82), and that they have failed to do." On petition for rehearing it was said: "The distinction between an action in equity to set aside an order entered by the probate court and an application filed in that court asking that an allowance of a claim be set aside because improvidently made seems to be lost sight of by the appellees in their petition for rehearing. Chancery will grant no relief in such a case, in

the absence of a showing of fraud or mistake in the procurement of the order. Whether this is essential when the application is addressed to the probate court was neither involved nor determined." *In re Douglas*, 140 Iowa, 605, we said: "It is said that the order of approval and allowance could not be set aside in a collateral proceeding, though the approval should not have been made. The force of this claim is not apparent, however; for the application to set aside the order was a direct attack thereon. . . . Code, section 3398, provides that mistakes in settlements may be corrected in the probate court at any time before the final settlement with and discharge of the administrator, and after that time by equitable proceedings, on showing such grounds as will justify the interference of the court. The special administrator was appointed for the purpose only of passing upon the claim of the appellant. He had no authority to pay the same, nor had he any funds for that purpose. If his report is to stand, the general administrator would still have to pay the claim and report his action relative thereto, and, so long as the estate is unsettled and the administrator is not discharged, mistakes that have occurred, including fraudulent claims and false charges, may be corrected. *Cowins v. Tool*, 36 Iowa, 85; *Dorris v. Miller*, 105 Iowa, 572; *In re Estate of Sawyer*, 124 Iowa, 485; *Tucker v. Stewart*, 121 Iowa, 714." See, also, *In re Pennock's Estate*, 122 Iowa, 624. The cases relied upon by appellant were either original proceedings in equity to set aside an allowance, as *Trimble v. Marshall*, 66 Iowa, 233, and *Milburn v. East*, 128 Iowa, 101, or exceptions to the final report of the administrator as *McLeary v. Doran*, 79 Iowa, 210; *Ashton v. Miles*, 49 Iowa, 564; and *In re Pennock*, 122 Iowa, 622, and as remarked in *Hendron v. Kinner*, *supra*, are not in point upon the proposition here involved.

Motion to set aside an allowance was held a proper remedy in *Re Estate of Davenport*, 85 Iowa, 293. Sec.

also, *Dorris v. Miller*, 105 Iowa, 572. The finding of the temporary administrator was manifestly erroneous, and as the heirs were not actually notified of the proceedings, and were not represented save perhaps by the temporary administrator, this representation being constructive only, and as no appearance was made before the temporary administrator in resistance to the claims, we think the motion to set aside the allowance was timely, and that, being a direct attack, the court had power to vacate and set aside its previous allowance of the claim.

3 SAME: erroneous allowance of claims: remedy: jurisdiction.

As the application was by motion, affidavits were properly filed in support thereof. See section 3833 of the Code and cases cited thereunder. While these were made by the heirs, they were not incompetent under section 4604 of the Code. *Clark v. Ross*, 96 Iowa, 402. There was no error, then, in denying the motion to strike these affidavits.

II. Error is also assigned on the court's refusal to order a sale of the real estate. As the amount of decedent's indebtedness was not ascertained, and could not be until a hearing on Rabbett's claim, there was no error in denying the application. Moreover, the heirs, in their resistance, made such a showing as to personal assets that *prima facie* at least there was no necessity for a sale of the real estate.

4 SAME: sale of real estate.

The real question in the case is the correctness of the order on the motion to set aside the allowance of the Rabbett claim. That order, as we have seen, is correct, and it would be a reproach to our system of jurisprudence if we were to hold that a probate court had no power to set aside such an allowance as was here made to the administrator. He is entitled to a hearing before the court or before another temporary administrator at which the heirs may present their objections, and there is no reason to believe that upon such hearing he will not receive all that is his due.

The orders of the trial court seem to be correct, and they are each and all *affirmed*.

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ELLEN WAHLBERG, Appellee, v. C. A. BUCHWALD LUMBER Co., Appellant.

**Continuance in equitable cases: DEPOSITIONS.** The defendant in an equitable action who appears at the appearance term and files a general denial does not have the absolute right, at a subsequent term, to elect to take his evidence by deposition and demand a continuance for that purpose without any showing of meritorious grounds therefor; and the fact that the appearance term continued practically until the trial term began was not important on this question of continuance, in the absence of such showing.

*Appeal from Marshall District Court.*—HON. C. B. BRADSHAW, Judge.

THURSDAY, JANUARY 11, 1912.

**ACTION** to quiet title. At the appearance term, the defendant appeared and filed a general denial. At the second term the defendant filed an election to take a part of its testimony in the form of depositions, and demanded a continuance as a matter of right without any other showing of cause. The trial court refused the continuance. Two days later the trial was had; the defendant appearing at the trial, but offering no evidence. There was a decree for the plaintiff. Defendant appeals.—*Affirmed*.

*Boardman & Lawrence*, for appellant.

*Bradford & Johnson*, for appellee.

EVANS, J.—The plaintiff was the owner of a homestead. The defendant had a judgment against plaintiff's

former husband. The plaintiff brought an action to remove the cloud created upon her title by the apparent lien of defendant's judgment. The case was brought for August, 1910, term of court. The defendant appeared therein at such term, and joined issue by a general denial. No further proceedings were had at such term. At the next term, which began October 20th, the defendant filed an election "to take a portion of his testimony in the form of depositions," and moved the court that the cause "be set down by trial upon depositions written and documentary evidence and evidence taken in open court." This motion was overruled. Thereupon the defendant moved for a continuance on the ground that it was entitled to the same as an absolute right for the purpose of taking its testimony in the form of depositions. For the purpose of this appeal every other question has been eliminated from the case. Appellant stands here on the following proposition of law: "That in a suit to quiet title, a party has the absolute right to take its testimony in the form of depositions, and is entitled to a continuance for that purpose."

Section 3652 provides as follows: "In equitable actions wherein issues of fact are joined . . . the court may order the evidence, or any part thereof to be taken in the form of depositions; or either party may, at pleasure, take his testimony, or any part thereof, by depositions." Section 4684 provides: "If an action is by equitable proceeding, then, without any other reason therefor, either party may take the deposition of any witness." Section 3656 provides: "The appearance term shall not be the trial term for equitable actions except those brought for mandamus, divorce, to foreclose mortgages, mechanics' liens," etc.

Section 3652 was construed to some extent in *Holbrook v. Fahey*, 51 Iowa, 406, and in *Lombard v. Thorpe*, 70 Iowa, 220. Each of these cases was a suit to foreclose a mortgage. The appearance term was therefore the trial

term under the provisions of section 3656. In each case the question arose at the appearance term whether the defendant was entitled to a continuance in order to enable him to take depositions under the provisions of section 3652. In the *Holbrook* case the trial court ordered that the case be heard upon depositions, and ordered continuance for that purpose. On appeal it was held in this court that it was clearly within the power of the trial court to order the case to be heard upon depositions, and that such order necessarily worked a continuance of the case. In the *Lombard* case, the defendant moved at the appearance term that the cause be continued, and that the evidence be taken by depositions. This motion was refused by the trial court, and the case was ordered to trial at the appearance term. Upon appeal, such order was affirmed in this court. It was said in the opinion, however, somewhat by way of dictum, that "the defendant had a right to elect to take his own evidence by depositions at the appearance term, and that of necessity would have continued the cause so that he could take it, but he did not do so." In *Ellwood v. Price*, 73 Iowa, 84, it was held that the trial court erroneously granted a continuance because it had made no order that the case be tried on depositions. It was said that there was no reason for a continuance unless the order for a trial upon depositions be first made of record. The above cases are not wholly consistent in their reasoning, but are consistent in their final conclusions. It is to be noted that there is nothing in section 3652 which, in terms, gives to the defendant a right to elect. This section simply provides that "either party may, at his pleasure, take his testimony or any part thereof be depositions." This provision is in simple harmony with section 4684, already quoted above. It is manifest, however, that, if a defendant in an equitable case should be compelled to proceed to trial at the appearance term, he would be wholly deprived of these provisions of the two

sections of the statute. The effect of the reasoning in the *Holbrook* and *Lombard* cases is to point out a course whereby a party may avail himself of these provisions of the statute, and may therefore obtain a continuance from the appearance term for that purpose. In *Varnum v. Winslow*, 106 Iowa, 287, this court expressed the view by way of dictum that the trial court was not without some discretion in the application of section 3652.

In the case before us the question did not arise at the appearance term. The defendant was not deprived of the benefits of section 3652 and section 4684 by being forced to trial at the appearance term. The question then is, Was the defendant entitled, as a matter of "absolute right," to make the election at the trial term which we have already noted, and to demand a further continuance on that ground alone? It is stated in the briefs that such has been the practice for many years in the court from which this appeal comes, and that by common practice, defendants have availed themselves of this statute as a means of obtaining a continuance, even though there were no meritorious grounds therefor. It is the contention of the appellant that such statute is available for such purpose without any showing of merit or good faith. In the *Lombard* case, *supra*, it was intimated that an election to take depositions and an application for a continuance for that purpose should include a showing that there existed evidence which the moving party desired to produce. This is only saying that an election to take a portion of the evidence in the form of depositions should be made in good faith, and not for the ulterior purpose of merely obtaining a continuance which could not otherwise be had. If a party has no evidence in contemplation which he intends to take by depositions, his purported election to take a portion of his evidence by depositions is not *bona fide*. In the case at bar there was, and is, no direct claim made that there existed any evidence in fact which would be available to the defendant in the form of depositions if

the order asked for had been made. The reasons which apply to an election at the appearance term to take depositions, and to demand a continuance for that purpose, do not necessarily apply when such election and demand are made at a subsequent term. We are united in the conclusion that the defendant can not as a matter of "absolute right" make an election and demand a continuance at the trial term, and the trial court properly so held.

II. It is made to appear in the record that the August term of court continued with occasional recesses until October 18th, and that the next term commenced October 20th. The trial in this case was had on November 14th. It is urged in argument by appellant that he could not take depositions during a term of court. This suggestion, however, is a departure from the proposition upon which he has rested his appeal. Such fact is important only as bearing upon the question whether the defendant had a meritorious cause for continuance. If the defendant had asked a continuance upon a showing of meritorious ground under the statute, the fact here suggested would be an important consideration. It did not do so. It claimed the continuance as an absolute right upon the sole ground of its election to take depositions. For the purpose of this appeal, therefore, such fact is not available to it.

The order of the trial court is therefore *affirmed*.

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EMMA F. SHELDON, Appellee, v. L. B. THORNBURG, as administrator of the Estate of ELIZABETH E. WARREN, Appellant.

**Evidence:** TRANSACTIONS WITH A DECEDENT: CONTRACTS. One seeking to enforce a claim against an estate can not testify to any conversation or transaction with the decedent regarding the same: Thus plaintiff, after being called to her sister's home, was incompetent to testify that she had a conversation or understanding

with her sister regarding her care and plaintiff's compensation; for, although no attempt was made to repeat the words employed, the mere statement that there was such a conversation or understanding related to a personal transaction within the meaning of the statute, which includes anything said or done in which both the witness and decedent took part, and which decedent, if living, would have the right to deny or affirm.

**Same.** A witness who is disqualified under the statute from testifying directly to a contract or understanding with a decedent can not testify to a state of facts relied upon to support an implied agreement.

**Same.** In seeking to recover a claim against an estate, evidence that a demand therefor was made against the surviving husband or wife is immaterial, although made in the presence of decedent; and in this case it was prejudicial.

**Same.** In the instant case plaintiff's deceased sister requested her by letter to come and care for her and expressed a willingness to pay her expenses, and it is held that the court should have told the jury that the letter could not be considered as evidence that decedent intended to pay plaintiff any compensation for her services, other than her expenses.

**Personal services: COMPENSATION.** While the service and care rendered by one sister at the sick bed of another may ordinarily be presumed to be gratuitous, still it may be of such character and duration as to exclude the idea of gratuity and warrant a finding that there was to be compensation. In this case refusal to instruct that the service was gratuitous was proper.

**Estates of decedents: CLAIMS: BURDEN OF PROOF.** An administrator pleading payment of claims filed against the estate has the burden of proof on that issue.

*Appeal from Dallas District Court.*—HON. J. H. APPLE-GATE, Judge.

THURSDAY, JANUARY 11, 1912.

PROCEEDINGS for the establishment of a claim made by plaintiff against the estate of Elizabeth E. Warren. Verdict for plaintiff, and defendant appeals. The material facts will be found sufficiently stated in the opinion.—*Reversed.*

*H. A. Hoyt and H. G. Giddings*, for appellant.

*D. H. Miller*, for appellee.

WEAVER, J.—The plaintiff is a sister of the deceased, Mrs. Warren. In December, 1909, Mrs. Warren being ill, plaintiff came to her sister's house, and cared for her, or assisted in caring for her until her death in July, 1910. Thereafter an administrator having been appointed for the estate of the deceased, plaintiff filed a claim for the services so rendered itemizing the same as thirty weeks labor in house-keeping and nursing at \$25 per week, making an aggregate of \$750. She also presented and filed another claim upon two promissory notes signed by the deceased, with her husband, W. E. Warren, aggregating the further sum of \$112. Allowance of these claims was refused by the administrator, and the issue was tried to a jury, resulting in a verdict for plaintiff for \$700. The evidence tends to show that for many years plaintiff had frequently visited in her sister's home; such visits on one or more occasions extending over a period of several months. During such visits she was treated as a visitor or member of the family, and assisted in and about the housework, paying no board and receiving no compensation for her services. On December 21, 1909, plaintiff then being in Keokuk, Iowa, her usual place of residence, received from Mrs. Warren a letter reading as follows: "Perry, Iowa, December 21. Dear Sister: I am very sick. Will you come? I will pay your expenses. Do not delay. [Signed] Lib." It was in response to this summons that plaintiff went to Mrs. Warren's home and entered upon the service for which she claims payment. This general statement is sufficient to indicate the point and bearing of the several assignments of error upon which a new trial is sought by the appellant.

I. The plaintiff was a witness in her own behalf, and, after stating that her sister and sister's husband and herself

were the only persons living in the house during the period of her alleged services, she was permitted, over defendant's objection, to testify as follows: "Q. I will ask you, Mrs. Sheldon,

EVIDENCE:  
transactions  
with a decedent:  
contracts.

whether while you were there you had any conversation with Mrs. Warren about the services you were rendering in her home at that time, and about any compensation that you would receive for it? Mr. Giddings: Defendant objects as incompetent and the witness incompetent to testify. Court: I will let her answer it by yes or no. A. Yes, sir, we had an understanding. We had a talk regarding it. Mr. Giddings: Defendant asks to strike the answer of the witness from the record for the reasons urged in the objection. Court: I will let her answer stand as to that. (Exception saved.) Q. You may state, Mrs. Sheldon, what, if any, services Mr. Warren rendered there while you were about the house in caring for Mrs. Warren or otherwise. Mr. Giddings: The same objection, and because they can not by process of elimination get at an incompetent fact by an incompetent witness. (Overruled, exception saved.) A. Mr. Warren did nothing in regard to the taking care of Mrs. Warren. The Court: Just what he did if anything. (Exception saved.) Q. Leaving out what you did? A. He did occasionally bring in some wood to put in the stove, and he would take up the ashes and carry them out. He would often take the slop pail and carry it away and empty it. I don't know of his doing anything else. Q. What else, if anything, did he do in the way of administering medicines to her? (The same objection. Overruled. Exception saved.) A. Nothing." Again she was permitted to testify that during Mrs. Warren's sickness and in her presence and hearing she, plaintiff, had some words with Mrs. Warren's husband, in which she told him to pay what he owed her, and she would go home; and that to his inquiry how much he owed her she responded, "Twenty-five dollars a week." To the admission

of the evidence to which we have referred proper exceptions were preserved.

We are quite clear that the testimony first quoted was erroneously admitted. As claimant against the estate of the deceased, plaintiff was not a competent witness concerning any conversation or personal transaction between herself and her sister, yet she was allowed to tell the jury that, after coming to the Warren home in response to the letter above mentioned, she had a conversation or understanding with deceased concerning the service she was rendering there, and the compensation she was to receive for it. If this did not amount to a conversation or transaction, it will not be easy to find its proper classification. True, she did not undertake to repeat the words employed, but she did that which may have been much more prejudicial to the defendant—she put her own construction on the unrevealed words and that, too, without fear of cross-examination, for defendant could not cross-examine concerning what was said between the sisters without surrendering his right to insist upon the incompetency of the witness to testify on that subject.

A witness may not testify indirectly to that of which he is incompetent to testify directly. *Watters v. McGreavy*, 111 Iowa, 538. While the word “transaction,” as used in the statute, may not, perhaps, be open to any all-embracing definition universally applicable to all cases, it is perhaps sufficient for present purposes to say that anything said or done between the witness and deceased or any act or communication in which they both had any part, and of which both had knowledge and concerning which the deceased, if living, could speak in corroboration or denial of the statements of the living witness, is a “transaction” within the purpose and intent of the law, and the surviving witness, if disqualified by interest, is incompetent to testify concerning it against the administrator of such deceased person. *Dysart v. Furrow*, 90 Iowa, 59; *Kroh v. Hains*, 48 Neb.

691, (67 N. W. 771); *Kauffman v. Baillie*, 46 Wash. 248, (89 Pac. 548); *Owens v. Owens*, 14 W. Va. 88.

Accepting this as the intended effect of the statute, we see no way to escape the conclusion that, if plaintiff had an understanding or agreement with the deceased upon the subject of compensation for services rendered by the former, it must be said to be a transaction of which she may not testify in her own behalf. It was a very material factor in making her case for the jury. The fact of such agreement being shown, even though its terms were not disclosed, it was an easy matter for the jury to supply this defect by presuming that the parties intended plaintiff to have at least the reasonable value of her labor. The prejudicial character of the evidence is emphasized by the fact that, except as shown by the plaintiff herself, the record is wholly devoid of testimony tending to show that the matter of her services and compensation therefor was ever mentioned, or made the subject of conversation between her and the deceased.

Equally objectionable is the testimony which plaintiff was permitted to give as to the nature, kind, and extent of her services to her sister. There being no competent evi-

dence of a contract, she could recover only  
2 SAME. upon a showing of facts raising an implied promise to pay. Ordinarily, as between living parties not standing in such relation to each other as to suggest the gratuitous character of the services, the implication of a promise to pay may be found from the simple fact that one of them does actually engage in the service of the other. If, however, the person receiving the benefit of such services dies, and claim is made against his estate to recover therefor upon an implied promise, the claimant is no more competent to testify to the facts relied upon to support such implication than he would be to testify to an express contract for such payment. *Peck v. McKean*, 45 Iowa, 19; *Smith v. Johnson*, 45 Iowa, 308; *Herring v. Herring*, 94

Iowa, 56; *Ballinger v. Connable*, 100 Iowa, 130. This well-established rule would have excluded the plaintiff's testimony as to the services rendered by her, and its admission was error.

Nor can we quite understand on what principle it was thought admissible to show plaintiff's demand upon the husband of the deceased for payment for her labor. No

claim is here being made against him, and  
3 SAME. his express or implied admission of obligation on that account has no bearing upon the merits of the claim against the estate of the deceased. The fact that such demand was heard by the wife would seem to be immaterial. That plaintiff was demanding or expecting payment from the husband is not evidence of any expectation of payment from the wife. Indeed, the jury might readily infer from plaintiff's statement to the husband that he was owing her \$25 per week as equivalent to testimony that such was the compensation agreed upon between herself and sister.

II. The defendant requested an instruction that the letter written by deceased to plaintiff, and to which reference has already been made, would not warrant the jury in find-

ing that deceased expected or intended to pay  
4 SAME. plaintiff anything more than the expenses incurred by her in complying with the request to come. This request was refused, and in its charge to the jury no reference was made to the letter, except as it was mentioned in the list of circumstances which could properly be considered upon the question whether the services of the plaintiff were rendered gratuitously. We think the jury should have been told that the only promise or agreement contained in such letter was to pay plaintiff's expenses, and that from such writing alone no other promise or expectation could be inferred.

III. It is contended that the plaintiff was in the home of her sister as a visitor or member of the family

for the time being, and, in the absence of an express contract to pay for her services, the jury should have been told she could not recover. We are of the opinion, however, that the trial court was right in refusing to so instruct as a matter of law and leaving the question of the relation in which plaintiff stood to the Warren family, whether as a member thereof or a visitor or employee therein to the finding of the jury.

It is true that the attendance by one sister at the sick bed of another, and the rendition of such aid as may naturally and properly be prompted by sisterly affection and solicitude may ordinarily be presumed to be gratuitous, but the service rendered may also be of such character and extent and performed under such circumstances as to exclude the idea of gratuity, and justify a finding that compensation therefor was contemplated by both parties. The evidence in this respect was not so clear or decisive as to make the question one for the court.

IV. Some complaint is also made of the instruction given concerning the claim made on the two promissory notes, but we discover nothing therein to which just exception may be taken. The defendant asserted that the notes had been paid and offered evidence to that effect. The jury were charged that the burden was upon him to establish the alleged payment by a preponderance of the evidence. In this there was no error. *Murphy v. McCarthy*, 108 Iowa, 38; *University v. Summers*, 108 Iowa, 500, Code, section 3340.

Other exceptions by the appellant relate to matters not likely to arise on a retrial, and we shall take no time for their discussion. The cause must be remanded for a new trial.—*Reversed*.

5 PERSONAL SERVICES: compensation.

6 ESTATES OF DECEDENTS: claims: burden of proof.

J. B. McNIEL, Plaintiff, v. L. J. HORAN, Judge of the  
Seventh Judicial District of Iowa, Defendant.

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**Intoxicating liquor: SALE BY PHARMACISTS.** Drugs and medicines  
1 containing liquor or alcohol, but so compounded that they can  
not be used as a beverage, may be lawfully sold by registered  
pharmacists, without a license to sell intoxicating liquors.

**Contempt: Certiorari: FINDINGS OF LOWER COURT: CONCLUSIVENESS.**  
2 Where contempt proceedings are brought to the Supreme Court  
by *certiorari* the findings of the district court do not have the  
force and effect of a jury verdict, but will be reluctantly inter-  
fered with on a fair conflict of the evidence.

**Intoxicating liquor: ILLEGAL SALE BY PHARMACIST.** A preparation  
3 of tonic bitters composed of herbs, rock candy, water and thirty  
percent alcohol is held to have been an intoxicant capable of  
use of a beverage, and could not lawfully be sold by a pharmacist  
as a medicine, except under a permit.

*Appeal from Muscatine District Court.*—HON. L. J.  
HORAN, Judge.

FRIDAY, JANUARY 12, 1912.

CERTIORARI proceedings in the nature of an appeal.  
The facts appear in the opinion.—*Reversed.*

*Betty & Betty*, for appellant.

*J. F. Devitt*, for appellee.

EVANS, J.—In August, 1908, a decree of injunction  
was entered against one Kuechmann, whereby he was en-  
joined from selling intoxicating liquors in violation of law  
within the county of Muscatine. In June, 1911, an infor-

mation was filed against him for contempt of court, in that he had sold intoxicating liquors within said county in violation of law and in violation of such injunction. The contempt proceeding was heard before the defendant herein as judge of the district court of such county, and at the conclusion thereof Kuechmann was discharged. A review of such action of the court is now sought by this proceeding. Kuechmann was a registered pharmacist, and owned and operated a drug store. As such, he sold "Centennial Tonic Bitters." This was an alleged compound consisting of various drugs, and containing thirty percent of alcohol. It was compounded by a wholesale house at Burlington, and purchased by Kuechmann in bottles, and sold in the same packages. The question upon which the controversy centered in the trial below was whether such compound was so medicated with other drugs as to have lost its distinctive character as an intoxicant, or whether it was still capable of being used as a beverage. Was it, in fact, a beverage, or was it a medicine?

Kuechmann, as a registered pharmacist, had a right to sell drugs and medicines, even though they contained intoxicating liquor or alcohol, provided they were so compounded that they could not be used as a beverage. In *State v. Gregory*, 110 Iowa, 624, it is said: "If the liquor was so compounded with other substances as to lose its distinctive character as an intoxicant, and to be no longer desirable as a stimulating beverage, and was in fact a medicine, then defendant was not guilty." To the same effect is *State v. Laffer*, 38 Iowa, 422. Whether the "Centennial Tonic Bitters" was in fact a medicine was a question of fact and not of law. *State v. Gregory, supra*. The trial court in effect found that it was medicine, and not a beverage.

It is now urged in behalf of the defendant that such finding of fact by the court in the contempt proceedings is conclusive upon us in this certiorari proceeding. We

1 INTOXICATING  
LIQUOR: sale  
by pharma-  
cists.

have never so held, nor are we prepared to do so now.

Where a certiorari proceeding is instituted in the district court against an inferior tribunal, and is brought before us on appeal from the order of the district court therein, we have held in such a case that the finding of fact by the trial court has the force and effect of a verdict. *Remey v. City of Burlington*, 80 Iowa, 470. Such is not the case before us. Where a contempt proceeding is brought before us for review upon writ of certiorari, it is sufficient to say now that we are reluctant to interfere with the findings of fact by the trial court upon a fair conflict in the evidence.

We have gone through this record with a searchlight, and we fail to find any substantial conflict in the evidence on the pivotal proposition. The evidence on behalf of the state disclosed the actual use of the liquor in question as a beverage and the intoxicating effects resulting therefrom. This was undisputed. The defense confined its evidence to expressions of opinion by witnesses that the compound was a medicine, and not a beverage. The principal witnesses upon this question were two medical witnesses. Dr. J. D. Fulliam testified as follows: "A liquid compounded as shown by 'Exhibit A' would be a medicine, and not desirable as a beverage. It would be a tonic or medicine. Alcohol is the best known means of extracting medicinal qualities of herbs and roots; and is the best known means of preserving them thereafter. Thirty percent of alcohol is a fair amount to be contained in these bitters. I have some in my office which contains thirty-six percent. Alcohol is nine percent water. A man, if he would take a combination of quinine and whisky and take enough of it, it would make him pretty full and sick. And the use of alcohol in a medicine stimulates the circulation; also stimulates the stomach. You can't find a tonic but that has more or less alcohol in it." Cross-examination: "Might be used as a beverage or tonic."

2 CONTEMPT:  
certiorari:  
findings of  
lower court:  
conclusiveness.

3 INTOXICATING  
LIQUOR: illegal  
sale by phar-  
macist.

- The old toppers might use it, some with abnormal appetites. Not a very pleasant taste. Has somewhat the taste of whisky or alcohol. Whisky has not a pleasant taste to me. It has the taste of whisky or aromatics in it with a slight bitter stomachic taste. Makes an agreeable tonic. Might make a pleasant drink as whisky."

Dr. E. B. Fulliam testified as follows: "Am a physician and surgeon in practice for thirty-two years. A liquid composed as shown in 'Exhibit A' would be a medicine. I have just tasted the medicine, and it is a mild tonic or a medicine." Cross examination: "This liquid is not desirable as a beverage, and I do not believe this liquid is capable of being used as a beverage; and, if used in excessive quantities, it would be detrimental. This liquid is intended as a stomachic, and is not desirable as a beverage. This medicine I could not bear the taste of. I couldn't drink it in a hundred years. It is thoroughly medicated. There is no doubt about that. And, if a man took large quantities of it, it would be likely to nauseate him. . . . The preparation contained in the formula might be used as a beverage by those insisting on using large quantities of it. It is palatable enough to be used as a beverage; if a man take sufficient of it, it might. The taste would not be so unpalatable that it could not be used as a beverage. Yes; it has a very pleasant taste. Could be used as a beverage, but would be very detrimental to the person using it. There is considerable rock candy in it. That is what makes it the pleasant taste and makes it palatable. Could get along without the rock candy, but the taste would be bitter. The rock candy takes away the bitterness. The rock candy makes it more palatable as a bitters and a better beverage. In my opinion fifteen percent alcohol would be sufficient to compound the ingredients. The more alcohol you put in, the more palatable it would be as a liquor drink. Beer has about two percent of alcohol. If you put quinine in alcohol, it would de-

stroy the alcoholic taste, and the alcoholic craving wouldn't be there. You could doctor that up very nicely with a little extract of licorice and make it palatable. You can mix up alcohol in certain herbs so as to make it palatable. The small amount of herbs, the alcohol, and rock candy in it does not destroy the palatability of it; no. To some people it would be a very disagreeable drink, and to others it would be a very pleasant drink. I suppose that to people who desire an intoxicant it might make a very pleasant and palatable drink."

If there is any fair conflict in the evidence, it must be found in the foregoing evidence of the medical witnesses. The evidence of the last witness is self-contradictory, and presents the only apparent conflict in the record. The compound in question consisted of water and alcohol medicated with a few bitter herbs and rock candy. The bitter herbs were intended to give medicinal character to the compound and to make the same nonpalatable, while the rock candy was intended to overcome the bitterness of the herbs and to render the compound palatable. The mere fact that the compound had medicinal qualities does not necessarily destroy its suitability as a beverage. The only suggestion in the testimony of the medical witnesses as to the purpose of this medicine is that it is a "stomachic" and a "tonic." The formal opinion expressed by the witnesses must be taken in the light of their entire examination. It appears conclusively from the testimony as a whole that the compound in question was capable of use as a beverage, and that it was actually used as a beverage, and that it was highly intoxicating in character. It follows that the learned district judge erred in the discharge of the injunction defendant, and that the order of discharge must be annulled.—*Reversed.*

In the matter of the Estate of MARGARETHA SCHMIDT,  
Deceased.

**Wills:** PROPERTY CHARGEABLE WITH DEBTS. Under the provisions of a will directing the payment of debts out of the personalty and authorizing the surviving spouse to use and control all remaining property, real and personal, and to sell or mortgage the same, and providing that in case of sale one third of the proceeds should be paid to a daughter, debts of the estate in excess of the personalty were chargeable against the realty, the daughter's interest attaching only to what remained after payment of debts.

*Appeal from Blackhawk District Court.*—HON. FRANKLIN  
C. PLATT, Judge.

FRIDAY, JANUARY 12, 1912.

THE opinion states the case.—*Affirmed.*

*Sager, Sweet & Sager*, for appellant.

*Hemenway & Martin*, for appellees.

SHERWIN, J.—Margaretha Schmidt and her husband, Chas. W. T. Schmidt, made a joint will, which contained the provisions following:

(2) It is hereby declared that all the property seized or possessed by either of these testators shall be taken and held as their joint property in equal shares in whichever of their names and in whosoever possession and control the same may be.

(3) Out of any personal property mentioned in the foregoing paragraph, all expenses of last sickness and burial and all expense of administration, and all joint indebtedness of testators, shall be fully paid and settled.

(4) The residue of their said property and estate, after satisfying the charges hereinabove mentioned, shall pass to the survivor of these testators with conditions and limitations, and for the uses and purposes hereinafter expressed.

(5) Such survivor shall have the full and absolute use and control of all such residue of property, real and personal, of whatsoever kind and wheresoever situated, and may sell and incumber the same at his discretion; but, in the case of sale, trade or exchange of any of said property, one-third part of the purchase price thereof shall be paid over for the use and benefit of our daughter, Lucia M. M. A. Hughes, the wife of George W. Hughes, or if she be not living, the use and benefit to go to such child or children as may be living at the time of such sale.

Margaretha Schmidt died two days after the execution of the will, and it was admitted to probate; her husband, Chas. W. T. Schmidt, being appointed the executor thereof. She left personal property valued at less than \$400 and real estate that sold for \$7,800. At the time of her death, she was jointly indebted with her husband to the amount of \$3,376.33, \$2,739.40 of which indebtedness was secured by mortgages on the real estate of which she died seised. In addition to such joint indebtedness, other proper charges against her estate amounted to \$1,672.14, so that the aggregate amount for which her estate was liable was \$5,048.47. The personal property being wholly insufficient to pay the debts of the estate, the executor made proper application for the sale of the real estate for that purpose, and, upon an order therefor being made, he sold the real property and paid the debts of the estate, including those secured by mortgages on the real property. Thereafter the daughter, Lucia M. M. A. Hughes, brought this suit for a construction of the will of her mother, and praying that the executor, her father, be ordered to pay over to her one-third of the entire sum received from the sale of the real estate, without deducting therefrom any part

of the debts of the estate of her mother. The trial court determined that she was entitled to one-third of what remained after payment of the debts and no more. She appeals.

The appellant's contention that she is entitled to one-third of the gross sum received for the land is based on the third paragraph of the will, which, she says, provides absolutely for the payment of all debts of her estate from the proceeds of the sale of the personal property left by her, and on the fifth paragraph, which provides that "in case of sale, trade or exchange of any of said property, one-third part of the purchase price thereof shall be paid over" to her. There is no serious disagreement between counsel as to the rules of law governing the construction of this will, but they differ widely as to their applicability in this particular instance. It is, of course, true that the intent of the testator is to control, and it is equally as true that such intent must be determined from the will itself, if it can be done, and that for such purpose the will must be considered as a whole. If the third paragraph of the will stood alone, it might with reason be said that the testatrix intended that the debts should be paid from the proceeds of the sale of the personal property, as distinguished from the real estate, and, if such were the case, it would follow that Mrs. Hughes would be entitled to one-third of the gross proceeds arising from the sale of the real estate, for the reason that it was competent for the testatrix to designate whether debts should be paid from personal or real property, and if she plainly intended to relieve her real property from any such burden, Mrs. Hughes would take one-third of the sale price thereof without any deduction on account of debts. *Huston v. Huston*, 29 Iowa, 347. But at the time the will was executed, there was a joint mortgage indebtedness of over \$2,700, and an unsecured joint indebtedness of over \$600. These items were definite and fixed at that time, and Mrs.

Schmidt knew that they would have to be paid from the property that she left. It will be presumed that she knew the value of the personal property that she then had, and knew that it was of insufficient value to pay the expenses connected with her last illness, the funeral expenses, and the expenses of administration.

With these facts in mind, we go to some of the other provisions of the will for the purpose of determining, if possible, whether she intended to burden the estate that she gave to her husband with the entire indebtedness, notwithstanding the fact that the larger part of such indebtedness was then secured by mortgage executed by her to secure their joint indebtedness. In paragraph 2 of the will, it is expressly declared that all property shall be taken and held as the joint property of both in equal shares. The record shows that Mrs. Schmidt, in fact, owned all of the property, both real and personal, and it may, therefore, be said that she undertook, at least, to give her husband an undivided one-half interest in all of her property, in addition to the other provisions of the will for his benefit. And such declaration was, in effect, a recognition of each that the other was equitably entitled to one-half of the property, no matter in whose name the title might be. The fourth paragraph of the will says that the residue of the "property and estate, after satisfying" the charges and debts, shall pass to the survivor, with limitations, for the uses and purposes thereafter expressed. This paragraph does not say that the residue left from the sale of the personal property shall be disposed of in the manner indicated, but it says that the residue of all of their property and estate shall be so disposed of. So that the property therein referred to clearly includes both personal and real. This is further manifest from the language used in paragraph 5, where it is said that the survivor "shall have the full and absolute use and control of such residue of property, real and personal, . . . and may

sell and incumber the same at his discretion." Whatever conclusion, then, would have to be drawn from a consideration of paragraph 3, if standing alone, will have to be modified if we give effect to the language of 4 and 5, which clearly indicates that it was the thought of the testatrix that a part, at least, of the real estate might be necessary for the payment of the charges and debts which she directed paid in the third paragraph. Another thing that throws light on the intent of Mrs. Schmidt is the provision in paragraph 5 that her husband might incumber the real estate without limit. There were then two mortgages on the property, and she evidently thought that it might be necessary to renew them, and that it might be necessary to give security thereon for their joint note that was then unsecured, or for some other purpose. She gave him unlimited power in the matter of incumbrance with the evident intent of relieving him as much as possible from the burden of present and future debts. She speaks of the sale and incumbrance of the residue of the property, and provides that a sale of such residue shall entitle the daughter to one-third thereof. It is clear to us that it was the intent of Mrs. Schmidt that her estate, both real and personal, should first be devoted to the payment of charges and debts, and that what was left thereof should pass to her husband, and then on as provided in the will, and we think that such intent is fairly apparent from the will and the conditions existing at the time.

The judgment of the district court will therefore be *affirmed*.

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LENA SEVENING et al., Appellant, v. GEORGE HENRY SMITH et al., Appellees.

**Wills: MENTAL CAPACITY: EVIDENCE.** The mere fact that a will is unreasonable or unjust in its terms, which may be considered in connection with evidence of the testator's mental capacity, is not of itself sufficient to avoid it for mental incapacity.

**Same.** Mere impairment of the mental faculties from old age or  
2 disease will not avoid a will, if the testator still retains sufficient mental power to know in a general way the objects of his bounty, the nature and extent of his estate and his intended distribution of it.

**Same:** BURDEN OF PROOF: DIRECTION OF VERDICT. The burden of es-  
3 tablishing a testator's mental incompetency is upon the contestant of a will, and when giving his evidence the strongest probative force it is clear that a verdict for him should have been set aside by the court, a directed verdict for the contestee is proper. In this case the evidence is held insufficient to invalidate the will on the ground of mental disability.

**Exclusion of evidence:** HARMLESS ERROR. The admission of other  
4 evidence covering the same point as that erroneously excluded cures the error; and where the question arises on appeal from a directed verdict, the admitted evidence will be accepted as true.

**New trial:** NEWLY DISCOVERED EVIDENCE. Where a party acquires  
5 knowledge of material testimony during the trial and fails to ask for time and opportunity to procure it, he is not entitled to a new trial on the ground that it was newly discovered; especially if no affidavit of the witness whose testimony was claimed to be newly discovered was attached to the motion and no reason was given for not doing so.

*Appeal from Benton District Court.*—HON. J. M. PARKER,  
Judge.

FRIDAY, JANUARY 12, 1912.

THIS is a contest over the will of George Smith, deceased. Plaintiffs, who are contestants, are the daughters and grandchildren of the deceased. Defendant, George Henry Smith, is a grandson and one of the principal beneficiaries under the will, and the other defendants are the executors named in the will. The defendant, George Henry Smith, is a brother of the contesting grandchildren. The grounds for the contest are the mental unsoundness and incapacity of the testator. In one of the pleadings filed it is charged that he was afflicted with *senile dementia* at the

time the will was made, and in another general mental and physical incapacity is alleged. A jury was called, and after the introduction of the testimony the trial court, on motion of the proponents, directed a verdict in their favor and ordered that the will be admitted to probate. The contestants appeal.—*Affirmed.*

*Tom H. Milner*, for appellants.

*Kirkland & White*, for appellees.

DEEMER, J.—Testator died June 20, 1909, at the age of eighty-one years. For many years prior thereto he had been afflicted with chronic bronchitis and organic heart trouble, but had been able to be about and to attend to his ordinary affairs down to within a few weeks of the time of his death. The will in controversy was executed March 5, 1909. It was drawn at testator's direction by one John Smith, the cashier of a bank in the town of Norway, duly signed by the testator, and properly witnessed. By the terms of this instrument he gave his wife all the household goods, and bequeathed to his grandson, George Henry Smith, all his real estate wherever situated, upon condition that he, the said grandson, pay to his wife the sum of \$500 annually during life; pay to Lena Sevening, one of his daughters, the sum of \$500 with interest; and to Elizabeth Boddecker, another daughter, the sum of \$1,500. Provision was made that the widow should have the use and free occupancy of the house, yards, and orchards on the farm where testator then resided, or upon which he might reside at the time of his death. The remaining personal property was bequeathed to the said grandson and to the two daughters, share and share alike. No direct devise, legacy, or bequest was made to any of the other heirs, and none of the other grandchildren, of which there were four aside from George Henry, were in any way remem-

bered. Another and former will, which was revoked at the time of the execution of the one in question, devised all of testator's real estate and one-third of his personalty to a son, Henry Smith. This son died early in February, 1909, and by reason of that fact, the one now contested was executed and the grandson substituted as a devisee or legatee in place of the son. The first will was used as a guide when the second one was drafted. It was drawn at the request of testator, who stated to the scrivener what he wished to have incorporated therein. It is conceded that testator's estate amounted to something like \$35,000. But it is also shown that the daughter Mrs. Sevening, and her husband, had property worth something like \$37,000; that the daughter Mrs. Boddecker had property worth \$20,000; that the deceased son had two hundred and forty acres of land and \$5,000, which went to his children upon his demise; and that the wife of testator, who survived him, took one-third of his estate, and upon her death the property passed to her heirs, who are the active parties to this litigation. Moreover, it is shown, that George Henry Smith was the favorite grandson of the deceased, and that none of the direct heirs of the testator were left in want. Although a little out of order, we may say that there is nothing in the disposition of the property as made by the will, which indicates a disordered mind. In this connection we may well quote from some of the cases.

Thus in *Trotter v. Trotter*, 117 Iowa, 418, we said: "While the fact that a will is unreasonable or unjust may be considered in connection with evidence bearing on the condition of testator's mind, it is not a ground for refusing probate. *Webber v. Sullivan*, 58 Iowa, 260; *Muir v. Miller*, 72 Iowa, 585; *Denning v. Butcher*, 91 Iowa, 425-438; *Manatt v. Scott*, 106 Iowa, 203-216. Whether a will is just or unjust is not in and of itself a question for the jury, for a person has the legal right to make an unjust disposition

1 WILLS: mental capacity: evidence.

of his property if he does so intelligently. Courts do not make wills for persons; when upon investigation they determine that an instrument is a will, it must be recognized as such, however unfair its provisions may be." And in *Johnson v. Johnson*, 134 Iowa, 34, this language was used: "That its provisions were unequal when considered with reference to those having claims on her bounty may be conceded. When equality is intended, there is no occasion for the execution of a will. The law wisely secures equality of distribution when a person dies intestate. Testamentary disposition of property is seldom entirely satisfactory to all having claims to consideration. The infirmities of human nature are likely to be evidenced in the last testament, voicing the dictates of affections and enmity, the partialities and dislikes of the testator while living. But to all these he has a right, and, if he chose, might be unjust in the disposition of his property." So that there is nothing in the terms of the will itself which in any manner indicates mental unsoundness.

But it is strenuously argued that enough other testimony was adduced by contestants to take the case to a jury on that issue. The discussion of that subject may well be prefaced by this quotation from one of our recent cases, with reference to the law applicable to such an issue: In *Perkins v. Perkins*, 116 Iowa, 259, we said: "The right of a man to dispose of his property by will as he sees fit is one which the law is slow to deny. No mere weakening of the mental powers—no mere impairment of the faculties—will invalidate a will executed in due form, so long as he retains mind enough to know and apprehend in a general way the natural objects of his bounty, the nature and extent of his estate, and the distribution he wishes to make of it. It is not necessary that he should be competent to make contracts or to transact business generally. . . . Old age and failure of memory do not of themselves necessarily take

2 SAME.

away a testator's capacity to make a will. . . . His mind may have become debilitated by age or disease, the memory enfeebled, the understanding weakened; he may even want the capacity to transact many of the business affairs of life; but, if he has mind enough to recollect the property he means to dispose of, the objects of his bounty, and the manner in which he wishes to distribute it among them, he has testamentary capacity. . . . The exclusion of some or all of his legal heirs from the benefits of a will is not sufficient evidence of incapacity." Again in the same case it was said: "The similarity of the provisions of the instrument herein sought to be probated with the one executed about a year previous to the death of his son is evidence that the testator had a deliberate and intelligent purpose in making the bequest to his son, and after the death of his son, to his grandson, the principal beneficiary under said instrument last executed."

The burden was upon contestants to show that testator was mentally unsound and incapable of making a will. But, as the verdict was directed, we must give to the testimony produced by them its strongest probative force. Yet, if, when so considered, it appears that it would have been the duty of the trial court to have set aside a verdict for contestants, had one been rendered, then there was no error in directing a verdict after all the testimony was adduced. *Meyer v. Houck*, 85 Iowa, 319; *Hurd v. Neilson*, 100 Iowa, 555; *Beckman v. Coal Co.*, 90 Iowa, 255.


The testimony shows that while testator was affected with chronic bronchitis for some years before his death, and at one time became overheated, and as a result had dizzy spells from time to time, yet there is no claim that his mind became affected to such an extent as to disqualify him from making a will until the death of his son Henry, who was the chief beneficiary under a former will, which death occurred in February of the year 1909. It is said

3 SAME: burden  
of proof:  
direction of  
verdict.

that this death caused testator great grief, and that from that time on his mind began to fail, and was so diseased at the time he made his will, in March of the same year, that he did not have the mental capacity to make it. It appears that for something like two years before his death testator's wife was an invalid, who, because of a paralytic stroke or some other ailment, was practically helpless and required constant care; that during this time the two, husband and wife, lived alone upon their farm, save as a hired man was with them; that testator took care of his invalid wife until about three months before his death, when she was taken to Mrs. Boddecker's that she might have better attention. About two weeks before testator's death, he also went to the Boddeckers' to live. Before that he had looked after his business affairs and was successful in their management. For about nine days before his death testator was unable to do anything, and by reason of his heart trouble, could not lie in bed. As the end approached, he became feeble both in mind and body, and a few days before his demise, had some hallucinations which his doctors said were due to the poison in his system, and not to a disordered mind.

The chief incidents relied upon as tending to show mental unsoundness are the following: While his wife was sick, he refused to call a doctor or to provide her with a nurse. It is shown, however, that one of the granddaughters was at the house almost daily and looked after part of the housework, and that testator did not call a doctor for the reason that he thought it would do no good. But the uncontradicted evidence shows that a doctor was in attendance upon her during her illness at her own home. It seems that at times, while he was sole nurse, testator left his wife for a few hours at a time to look after his own private affairs, believing that, as she was practically helpless, no harm would befall. He expressed a wish that his wife would die before him, at times stating that he

did not wish her to be left alone, and at other times saying that, if she did so, he could dispose of all of his property as he would. It is also shown that at times he was forgetful, that he muttered to himself, repeated his conversation to the same person, and often did not recognize his own kin. He also complained of his head after the death of his son, and said that he thought he was losing his mind. At one time he started to milk the cows at about 2 or 3 o'clock in the afternoon. It was also shown that a neighbor, who had been away for about three months, called at testator's house, and testator said that he thought this neighbor had been away for a year or more. Testimony was also adduced tending to show that after the death of testator's son he became forgetful, left packages at a neighbor's, and failed to remember his errands into town. It was also shown by at least one witness that, after the death of his son, testator would mutter to himself, become excited, gesticulate with his hands, and complain of pain in his head. He stated on several occasions before his death that he did not know what he was about, and that "his boy's death would use him up." These are the salient points of contestants' case. Some of them are explained in the testimony adduced for proponents, but, taking them all as true, contestants' expert witness finally stated that they constituted no evidence of *senile dementia*, and his answer to a hypothetical question containing these and other matters was: "I don't know as one could give a very intelligent answer to that question. It is considerably mixed up. There is a good deal of evidence in that showing he did have some mind and that he was capable of reasoning, and there are other points in that question that looks as though he was a little unbalanced." No hallucinations are shown save those which arose when dissolution was imminent. There was no melancholia, but undoubtedly, if the testimony is to be believed, forgetfulness and loss of memory. Notwithstanding this, he continued



to conduct his business with circumspection down to the time of his last illness. It is not shown that his forgetfulness was due to anything other than his age, and his complaints as to his head were not of themselves evidence of insanity.

It is shown that testator always had a peculiar method of gesticulation. Aside from his relatives, who are contesting the will, no one noticed any change in testator's mental condition after his son's death, save that he seemed to be much affected thereby. His grandson, George Henry Smith, was his favorite, and he expressed to others the thought that he had done for his other heirs all that he thought they were entitled to. The incident with reference to the milking of the cows is explained by testimony to the effect that testator did so to gratify a whim of his invalid wife, who, it seems, was very weak in mind and body. The testimony from doctors was to the effect that this invalid wife was given all the medical attention which her case demanded, and that they were called to her bedside quite a number of times during her illness, which, as we have seen, continued for more than two years. There is no testimony that she needed any attention which was not given, and no showing of any conduct on the part of testator toward her which would indicate unsoundness of mind. During all of the time, down until two weeks before his death, testator attended to his business with judgment and discretion. He talked over the matter of his property, the claims that his relatives had upon his bounty, and gave reasons why he made the last will as he did. He also had reasons which he gave for making the first will in favor of his son, and after the son's death, knew it was necessary to make a change in the will, which he did. He was left alone, save as a renter was either in the house or near at hand, with his invalid wife, and his daughters, who are contesting the will, never indicated that they thought he was incompetent to take care of their mother

until about three months before his death. Even then they thought him perfectly competent to look after his own affairs. These daughters did not often visit the testator while he was taking care of his invalid wife; but the Smith children evidenced more concern, and quite frequently helped with the housework. It is true that testator fre-

nizing friends or near relatives. The testimony adduced by contestants did not make out a *prima facie* case. At best, there was nothing more than a scintilla upon the issue tendered. In such cases a verdict should not be permitted to stand. This being true, there was no error in directing a verdict for the proponents.

Some rulings on the receipt and rejection of testimony are complained of. Some of these were erroneous, but the error was cured by the admission of other testimony to the same point. If the case had gone to a jury, and there had been an adverse verdict, the situation would be different from what it is as the matter is now presented. For the purpose of this appeal we must accept this testimony as true, and it does not need corroboration. Hence, the admission of other testimony covering the same point cures whatever error there may have been in the ruling.

Contestants filed a motion for a new trial on the ground of newly discovered evidence. This motion was overruled, and, as we think, correctly. They had information regarding this witness' testimony before the trial was concluded and did not ask to be allowed to procure his testimony or for a postponement until they could get it. This in itself was sufficient ground for denying the motion. *State v. Morgan*, 80 Iowa, 413. Aside from this however, no affidavit from the witness whose testimony it is claimed was newly discovered was attached to the motion, or any reason given for not doing so. The affidavit attached to the motion was purely hearsay and not sufficient basis for a new trial. *Hand v. Langland*, 67 Iowa, 185.

The case is no stronger, if as strong in its facts, than *Perkins v. Perkins*, *supra*; *Gates v. Cole*, 137 Iowa, 613; and *Holmberg v. Phillips*, 78 N. W. 66, in each of which we held the testimony insufficient to take the case to a jury on the question of mental unsoundness. See, also,

4 EXCLUSION OF  
EVIDENCE:  
harmless error.

5 NEW TRIAL:  
newly discovered evidence.

*In re Stufflebeam*, 135 Iowa, 338; *Furlong v. Carraher*, 108 Iowa, 492.

Finding no prejudicial error in the record, the judgment must be, and it is, *affirmed*.

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J. M. QUINN, Appellant, v. TOBIAS TOBIASON.

**Landlord and tenant: BREACH OF COVENANT: EVIDENCE.** In this action by a landlord for breach of his tenant's agreement to destroy noxious weeds on the premises the evidence is held to support a finding that the covenant was not broken.

**Same.** The lease in this case obligated the tenant to exercise reasonable care to destroy noxious weeds and there was evidence tending to show that the most effectual way of doing so was to seed the land to grass. The landlord was obligated to furnish the grass seed, which he failed to do. *Held*, that the tenant was not required to seed the entire premises as a means of destroying the weeds.

**Same: EVIDENCE.** In this action for breach of the tenant's covenant to destroy noxious weeds, statements of the landlord previously made that the farm had increased in value and that the tenant was a good farmer were not prejudicial, and were competent as admissions of the landlord, inconsistent with his contention on the trial that the farm had been damaged by the default of the tenant.

*Appeal from Shelby District Court.*—HON. E. B. WOODRUFF, Judge.

FRIDAY, JANUARY 12, 1912.

**ACTION** to recover damages for breach of covenant in a lease, by which it was stipulated that defendant, as tenant, was to use every effort to kill and destroy cockleburrs on the land of plaintiff covered by such lease. The defendant denied any breach of the agreement on his part, and by way of counterclaim, asked judgment for his expense in furnishing grass seed and repairing fences, which

items of expenditure should have been met by the plaintiff under the terms of the lease. There was a trial to a jury and a verdict accompanied by special findings in favor of the defendant in an amount covering a substantial portion of his counterclaim. From judgment on this verdict, the plaintiff appeals.—*Affirmed.*

*Cullison & Cullison*, for appellant.

*E. S. White*, for appellee.

McCLAIN, C. J.—The lease in question, which was for five years commencing the 1st of March, 1905, contained the following provisions: "It is understood and known by the parties hereto that the leased land is quite thoroughly filled with cockleburs, and lessee herein agrees to use every effort to kill and destroy the same. . . . On or before August 30th of each year, during the life of this lease, Tobias Tobiason shall cut all cockleburs on said leased land before they mature and ripen seed. And, in case of this failure to cut said cockleburs within the above-specified time, he shall forfeit all his rights under this lease at the option of the lessor herein."

In presenting to the jury the question whether under the evidence there had been a violation of this stipulation to plaintiff's damage, the court submitted certain special interrogatories, which, with the answers thereto returned by the jury, were as follows:

(1) Did the defendant use every effort to kill and destroy the cockleburs on the farm in question? Ans. No.

(2) Did the defendant, on or before August 30th of each year during the term of his lease in question, cut all the cockleburs on said farm before they matured and ripened seed? Ans. No.

(3) If the defendant had used every effort to kill and destroy said cockleburs, and on or before the 30th day of August of each year during the term of his lease, had

cut all of said cockleburs before they matured and ripened seed, would said premises be free or practically free from the cockleburs at this time? Ans. No.

(4) Are said premises free, or practically free, from cockleburs at this time? Ans. No.

(5) Are said premises now seeded with cockleburs to such a degree or in such quantities as to decrease their rental value? Ans. No.

(6) Will the cockleburs now on said premises injure the soil of the same? Ans. No.

(7) If the defendant had used every effort to kill and destroy the cockleburs on the farm during the term of the lease from March 1, 1905, to the present time, would said premises now be free from cockleburs or practically so? Ans. No.

(8) What do you find from the evidence to be the reasonable annual rental value per acre for farming purposes of the premises in question now, if the same were free from cockleburs? Ans. \$3.

The principal claims of counsel for appellant are that some of these answers were so entirely without support in the evidence, and so far in conflict with the undisputed evidence, that the verdict should have been set aside on appellant's motion for a new trial on the ground that the jury must have been governed by passion and prejudice in its deliberations and the return of its verdict; and that there is such inconsistency between the answers to the first and second interrogatories and those returned to other interrogatories that passion and prejudice were clearly apparent.

There was evidence, however, tending to show that the only effectual way of clearing land of cockleburs after it had become thoroughly infested with them was to seed

it down to grass, and keep it in meadow or pasture for at least five years, and that even a longer period of such treatment might be

1 LANDLORD AND  
TENANT:  
breach of cov-  
enant: evi-  
dence.

necessary to entirely eradicate the cockleburs; and, further, that the treatment required in the lease

of cutting all the cockleburrs before they mature and ripen seed and on or before the 30th of August of each year might be quite ineffectual. There is nothing in the lease to indicate any intention that the farm should thus be seeded down to grass, and kept in that condition for the term of the lease. On the contrary, it appears that the farm was leased to be farmed in the usual way, portions of it being in grass, other portions under cultivation; and it also appears that it was within the contemplation of the parties to have some part of the land sown to grass provided plaintiff should furnish the seed, which he failed to do. Under this state of the record, we can not say as a matter of law that, if defendant had used every effort to kill and destroy the cockleburrs which was within the reasonable contemplation of the parties, the land would have been freed from them, and at the termination of the lease would have had an increased rental value beyond that which it actually had as surrendered, or that the failure of the defendant to use every effort to kill and destroy the cockleburrs within the reasonable contemplation of the parties, or his failure to cut them each year on or before the 30th of August, before they matured and ripened seed, caused the land to have a less rental value than it would have had if these precautions had been taken. The fact is that the evidence was in conflict on the issues submitted to the jury, and the findings of the jury were neither so far without support in the evidence nor in conflict as to warrant an interference with its findings or require a holding that the verdict and answers to interrogatories were the result of passion and prejudice. The finding that the rental value of the farm per acre for farming purposes, if free from cockleburrs, would be only \$3 per acre is supported by evidence tending to show that the soil had been impoverished by repeated cropping, and that the improvements on the farm were poor and in bad condition. The jury may well have taken these circumstances into account,

and, in view of the testimony as to the rental value of other farms in the neighborhood with better improvements and in better condition, may have found without passion and prejudice that the rental value of this farm was as stated.

Counsel assume that, if the proper method of eradicating cockleburs was by seeding the land to grass, the defendant was bound to pursue this method with the result

that, when surrendered, the entire farm  
<sup>2</sup> SAME. would have been in grass, and would have had the rental value of meadow and pasture land. But, as already suggested, the lease does not indicate any intention as between the parties that the farm should be thus treated. To thus treat it would have involved an expense on the part of defendant in improving the plaintiff's farm which he was not bound to incur.

A witness was permitted to testify, over objection, that plaintiff, about two years before the trial, declared to the witness that the farm had increased in value while he owned

it from \$50 per acre to \$100 or \$150 per  
<sup>3</sup> SAME: evidence. acre, and that defendant was a good tenant and a hard worker. We can not see that this testimony was possibly prejudicial to the plaintiff, and, at any rate, it was competent as showing an admission of plaintiff to some extent inconsistent with his contention on the trial that through the fault of defendant the farm had been materially damaged, for rental value must depend to some extent on actual value and *vice versa*.

Some instructions with reference to defendant's counterclaim are made the basis of complaint, but, as applied to the evidence on the issues presented in the record, we think that the instructions were not misleading, and, if further instructions were desired to cover the matters as to which the complaint is now made, they should have been asked.

The judgment of the trial court is *affirmed*.

**LEWIS H. SMITH, Appellant, v. F. L. MEEKER, Administrator of the Estate of PETER E. SMITH, Deceased.**

**Gifts:** CONSUMMATION BY DELIVERY: FORMAL TRANSFER. Delivery of  
1 certificates of stock to the donee with intent to transfer the right of ownership is sufficient to consummate a gift without a record of the transfer on the books of the corporation, or a formal assignment or indorsement of the certificates.

**Same:** SUBSEQUENT WRITINGS: EFFECT. Plaintiff's father in this case  
2 gave him corporate stock by delivering the certificates to him subject to the payment of a specified sum to each of two grandchildren after the father's death. *Held*, that the execution of instruments by the father thereafter, addressed to the grandchildren, reciting a present division of his property and that he had left his affairs with the plaintiff, and that he had promised to pay plaintiff at his death certain shares of the stock in question, with accumulations thereon, did not negative a present gift of the stock by delivery of the certificates.

**Same:** TRANSFER OF TITLE: EVIDENCE. Where the uncontradicted evi-  
3 dence shows an absolute delivery of the gift to the donee, subject only to the payment of a specified sum after the donor's death, and there is no evidence to indicate an attempt on the part of the donor to exercise further control over the gift, a finding that the donor intended a transfer of title only upon his death is erroneous.

**New trial:** NEWLY DISCOVERED EVIDENCE. In this action to establish  
4 a gift of stock certificates the newly discovered evidence of two witnesses who would testify to declarations of the donor, other than those testified to on the trial, to the effect that the donor had given the stock to the plaintiff was not cumulative, and required the granting of a new trial, a sufficient showing of diligence having been made.

**Replevin:** NECESSITY OF DEMAND. Where there was a consummated  
5 gift of corporate stock during the life of the donor and the administrator of his estate obtained possession of the same from the corporation to which it had been sent for a transfer on its books, and without the knowledge or consent of the donee, such possession was wrongful and demand therefor was not necessary to maintain replevin of the stock.

**Election of remedies:** DISMISSAL OF APPEAL. Plaintiff in this action 6 claiming certain stock certificates under an alleged gift from his father in his lifetime, brought action against the administrator of the father's estate to recover possession of the same, and appealed from a judgment for defendant. Pending the appeal he instituted proceedings in probate to recover the value of the stock from the father's estate upon the strength of a written instrument in which the father promised to pay the son the amount of certain shares of the stock at his death. *Held*, that such proceeding did not amount to an election of remedies or an acceptance of the judgment so as to require a dismissal of the appeal.

*Appeal from Marshall District Court.*—HON. C. B. BRADSHAW, Judge.

FRIDAY, JANUARY 12, 1912.

ACTION in replevin for the recovery of possession of certain shares of corporate stock alleged to be the property of plaintiff. The case was tried by consent without a jury, and judgment was rendered for defendant, from which plaintiff appeals.—*Reversed*.

*Bradford & Johnson*, for appellant.

*J. L. Carney*, for appellee.

MCCLAIN, C. J.—In January, 1908, Peter E. Smith, who was living with his son, the plaintiff in this case, was the owner of two hundred and five shares of the corporate stock of the National Grocer Company, a corporation having its principal place of business in Detroit, Mich.; each of such shares being of the par value of \$100. There was testimony tending to show that about that time the father took the certificates representing this stock from a box in which he was in the habit of keeping his private papers in his own room at his son's house, and handed them to his son, with the statement that the son was to have them on

a condition imposed that after the father's death, the son should pay \$1,000 each to two grandchildren, not the children of the plaintiff, and that the son then took these certificates and placed them in a safe at his store and retained the control of them until the father's death in the following December. After the father's death, these certificates were sent to the company with the request that transfers thereof be made on the books of the company, \$1,000 in par value to each of the grandchildren, and the balance to the plaintiff. The company, instead of making such transfers, delivered the possession of the certificates to defendant as administrator of the estate of Peter E. Smith, and this action is brought to recover possession of them, under the claim that by a completed gift the right to the certificates had passed to plaintiff before his father's death.

I. Unless the competent testimony tending to show delivery to the plaintiff of the certificates of stock, with the intention that the title to such certificates and the right to possession thereof should at once pass to the plaintiff with the obligation, assumed as a part of the transfer accepted by him, that on the father's death \$1,000 in money or stock should be paid or delivered by plaintiff to each of the grandchildren, was met by some evidence offered for the defendant that the delivery of the certificates to plaintiff was not with the intention that plaintiff should thereby acquire absolute title and right of possession, plaintiff's case was made out, and judgment should have been rendered in his favor. The transaction which plaintiff's evidence tended to establish would constitute a completed gift, and the title to the shares would hereby be vested in plaintiff. There is no controversy between counsel as to what is necessary to constitute a completed gift. The cases relied upon by appellee are those in which it is found from the evidence that the present intention to pass title did not exist or delivery to the intended donee was not made. *Jones v. Luing*, 152

Gifts: consummation by delivery: formal transfer.

Iowa, 276; *Oliver v. Perry*, 131 Iowa, 54; *In re Brown's Estate*, 113 Iowa, 351.

A delivery of certificates of stock into the hands of an intended donee, with the purpose of at once transferring to him the right of ownership in such stock, is sufficient to consummate a gift thereof, although no transfer is recorded on the books of the corporation. *Tucker v. Tucker*, 138 Iowa, 344.

A formal transfer or assignment by indorsement on the certificate is not essential where the intention is to pass title by delivery. *Gilkinson v. Third Ave. R. Co.*, 47 App. Div. 472, (63 N. Y. Supp. 792); *Reed v. Copeland*, 50 Conn. 472, (47 Am. Rep. 663); *Bond v. Bean*, 72 N. H. 444, (57 Atl. 340, 101 Am. St. Rep. 686); *Brown v. Crafts*, 98 Me. 40, (56 Atl. 213); *First National Bank v. Holland*, 99 Va. 495, (39 S. E. 126, 55 L. R. A. 155, 86 Am. St. Rep. 898). This is also the rule as to negotiable paper. *Camp's Appeal*, 36 Conn. 88, (4 Am. Rep. 39); *Walker v. Crews*, 73 Ala., 412.

On the question of intent, counsel for appellee relies on two writings addressed to and accepted by the grandchildren respectively, informing them that after his death, the son would pay to each of them \$1,000 in National Grocer stock, or, if it had been taken up, then \$1,000 in cash, and another instrument executed by the father in October, in which he promised to pay to the son at his death, two hundred and five shares of National Grocer stock and all accumulations from said stock; the contention being that these instruments indicate a testamentary disposition of property, and not a present or past gift. The instruments addressed to the grandchildren dated in January, although not formally accepted by them until later, do not indicate in any way the intention of the father towards this plaintiff. They recite a present division of the father's property, so that there may be no dispute about it after he is gone, and

2 SAME: subsequent writings: effect.

contain the ambiguous language, "I leave (in one instance, and in the other, 'I turn') all of my affairs into the hands of my son Lewis (this plaintiff)." If these instruments were relied upon for plaintiff as in themselves proving a gift to himself, they might well be regarded as of doubtful import; but they are not so relied upon, and they certainly do not negative the intent to make a present gift to the son of the stock by delivery of the certificates. The instrument containing a promise to pay the shares of stock to the son after the father's death has no materiality to the present controversy. If the gift had already been completed, this promise would not revoke it, but, on the other hand, might be regarded as a confirmation. *First National Bank v. Holland*, 99 Va. 495 (39 S. E. 126, 55 L. R. A. 155, 86 Am. St. Rep. 898); *Reed v. Copeland*, 50 Conn. 472, (47 Am. Rep. 663). If the gift had not been completed, this promise would not effectuate it. This last instrument was offered in evidence for plaintiff, and defendant objected to its being considered. The court reserved a ruling on the objections, and no such ruling seems to have been made. Clearly, therefore, this instrument can not now be relied upon by defendant.

Several witnesses testified to declarations, made by the father later than in January, indicating that he had already given the stock to the son, and the court expressly found that the father wished and intended that the stock should go to the son, and we have no occasion, therefore, to go into the evidence further on the question of intention. The finding of the court was, however, that the father contemplated that the division of his property should take place after his death. In view of the uncontradicted evidence of the unqualified and absolute delivery of the certificates of stock to the son in January, and in the absence of any evidence whatever to indicate an attempt on the part of the father to exercise any further dominion or control over the certificates, we think the finding of the court that he contem-

3 SAME: transfer of title: evidence.

plated a transfer of title only after his death was entirely without support in the record. It may be, as contended for appellee, that the safe in which the certificates were placed by the son was one to which the father had access; but, in the absence of any indication that the father understood that the certificates were to be kept by the son in a place to which he would have access, the fact is of no significance. There is not a *scintilla* of evidence that the father asserted, at the time of the delivery of the certificates to the son, or afterwards, any right or intention to exercise any further control over them.

In conclusion on this branch of the case, it is sufficient to say that there was evidence of a contemplated gift and nothing in the record to rebut the case thus made out.

II. Even if we should find from the record some conflict of evidence as to the intention of the father, so that we should have to say that the finding of the lower

court on that question must conclude us, giving to the finding the effect of the verdict of a jury, nevertheless, we should be compelled to reverse the case on the refusal of the court to grant a new trial on the ground of newly discovered evidence. The showing in that respect was that two daughters of the plaintiff, who were, at the time of the trial, married and residing away from home, would testify to declarations of their grandfather that he had given the stock to his son. The showing as to this evidence was sufficient to indicate that the plaintiff was not lacking in due diligence in not sooner becoming aware of its existence, and such evidence was plainly not cumulative, as it related to other declarations of the grandfather than those to which other witnesses had testified.

III. As there was a consummated gift to plaintiff of the certificates of stock, the possession thereof by the defendant as administrator, was unlawful. Plaintiff did not, at any time, surrender his right of possession, and the

<sup>4</sup> NEW TRIAL:  
newly discovered evidence.

delivery of the certificates by the corporation to the administrator was wrongful. Under such circumstances, no proof of demand was necessary to sustain the action of replevin. *Leek v. Chesley*, 98 Iowa, 593; *Ruiter v. Plate*, 77 Iowa, 17.

5 REPLEVIN:  
necessity of  
demand.

IV. In support of a motion to dismiss the appeal which has been submitted with the case, the appellee shows that, after judgment had been rendered against plaintiff, he instituted proceedings in the probate court to recover the value of the stock from the estate, basing such right of recovery on the written instrument, already referred to, in which the father promised to pay to the son, at the father's death, two hundred and five shares of National Grocer stock and all accumulations therefrom. We are unable to see how this proceeding against the administrator could be construed into an acceptance of the judgment and an abandonment of the right of appeal. The question of election of remedies is not involved. If any election was necessary, then plaintiff had made it by suing in replevin for the certificates of stock, and that action he is still prosecuting by an appeal to this court. He has not performed the judgment against him, nor has he accepted the benefit of such judgment. The motion to dismiss the appeal must therefore be overruled.

6 ELECTION OF  
REMEDIES: dis-  
missal of ap-  
peal.

The judgment of the trial court is *reversed*.

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KRUSE & BISHOP v. WM. HAUSER, Appellant.

**Brokers: COMMISSIONS: SALE BY THIRD PERSON.** A broker authorized by the owner to procure a purchaser for real estate is not entitled to a commission unless he was the procuring cause of the sale. In this case the sale was made by a third person who learned that the farm was for sale by a casual conversation with one of the partners of the agency, but he was not aware that his informant was a partner and he made no express agreement

to act as a subagent. *Held*, that as the plaintiffs did not have the exclusive right of sale, and as the sale was effected by the third party acting independently of them, and not as subagent, plaintiffs were not entitled to a commission.

*Appeal from Linn District Court.*—HON. W. N. TREICHLER, Judge.

SATURDAY, JANUARY 13, 1912.

SUIT to recover a broker's commission for procuring a purchaser for real estate. Verdict and judgment for plaintiffs. The defendant appeals. —*Reversed*, with directions to enter verdict.

*Voris & Haas*, for appellant.

*F. L. Anderson*, for appellees.

SHERWIN, J.—The defendant was the owner of a farm in Linn county, Iowa, which he wished to sell. He listed it with several agents, among whom was one of the plaintiffs herein, Kruse. He agreed with Kruse that he would pay him a dollar an acre if he found a purchaser for the farm, but also stated to him that the first man who brought a buyer would get the commission. This agreement with Kruse was made some time in August, 1909. Kruse was a real estate agent, who lived in Alburnett, where the defendant also lived. The plaintiff, Bishop, lived a little ways from Alburnett, and was a farmer, who had moved to Linn county from Illinois that spring. Jesse Hall was a farmer from Illinois, who lived some nine or ten miles from Alburnett. Hall and Bishop became acquainted after they both came to Linn county. About two weeks after they first met, Hall and his wife visited Bishop's family at their home near Alburnett. This visit was about September 12, 1909. During the visit, Bishop and Hall talked

about Iowa and Illinois lands, and Hall said that he wanted his brother-in-law, Moore, then living in Illinois, to buy land in Linn county, whereupon Bishop told him that the Hauser farm was for sale at \$100 per acre, that it was a good farm and cheap, and that he had better write Moore about it. Bishop also told Hall at that time that Kruse had the farm for sale and if Moore came out to take him to Kruse. Soon thereafter, Hall personally inspected the defendant's farm, and then saw the defendant in Alburnett, and talked with him about the farm, price, and commission, and while in the defendant's house, he wrote to his brother-in-law, Moore, about the farm. Hall and Moore had some correspondence relative to the farm, and on October 6, 1909, Moore and his wife arrived at Hall's home. The next day Hall took them to see the defendant at his home in Alburnett, and, in company with defendant, they looked the farm over, and the next day Moore bought it. Hall never saw Kruse before the sale was made, nor did he know that Kruse and Bishop were partners in the real estate business.

Kruse & Bishop are not entitled to a commission from the defendant unless they were the efficient procuring cause of the sale. *Boyd v. Watson*, 101 Iowa, 214; *Hunn v. Ashton*, 121 Iowa, 265; *Monson v. Carlstrom*, 141 Iowa, 183; *Gilbert v. McCullough*, 146 Iowa, 333.

On no theory can it be said that these brokers were the efficient procuring cause, unless it be found that Hall was their subagent, and this for the reason that, if Hall acted independently of them, their rights were not invaded, because they did not have an exclusive agency. Hall could not become the subagent of the plaintiffs without an agreement on his part, and there is not a particle of evidence tending to show that he ever consented or agreed to so act. The mere fact that Bishop told him that Kruse had the land for sale is of no consequence. Hall went directly to Hauser and learned from him that Kruse did not

have an exclusive agency, and he was then at liberty to procure a purchaser on his own account. In other words, Bishop's statement to him that Kruse was an agent for the sale of the land did not make him a subagent of Kruse, or prevent him from earning a commission for himself. The case is, in principle, like *Monson v. Carlstrom, supra*, where the purchaser heard the agent say to another that certain property was for sale and went and bought it, and it was held that the broker was not entitled to a commission. This case is even stronger for the defendant than that, for here Hall did not himself buy, but furnished the purchaser in another. On the record, the plaintiffs were not entitled to recover, and the court should have sustained the motion for a directed verdict. The verdict should also have been set aside on motion for the reason that, under the third instruction given and the evidence, the plaintiffs were not entitled to a verdict.

The judgment is reversed, and the case remanded, with instructions to the trial court to render a judgment for the defendant in accordance with this opinion.—*Reversed and remanded.*

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R. G. SMITH v. F. E. FOSTER and M. H. REHDER,  
Appellants.

**Intoxicating liquors: SALE BY DRUGGIST: SPECIFICATION OF PURPOSE**

- I A request for the sale of liquor by a druggist holding a permit must show the purpose for which the liquor is desired, and the statement that it is desired for a "mechanical purpose" is not sufficient; there must be a further specification of the purpose for which it is desired.

**Same: REQUESTS FOR LIQUOR: UNLAWFUL SALE.** The fact that a drug-

- 2 gist writes in the blank application for the purchase of liquor, as prescribed by statute, the number of the request, the date, and his name and number as a pharmacist, all of which precede the request proper, will not render the sale unlawful; but the statute requiring the purchaser to fill out the request in his own handwriting does not permit the druggist to insert therein the amount

and kind of liquor desired, to do which will render the sale unlawful.

**Same:** NUISANCE: INJUNCTION: COSTS. Upon proof of the illegal  
3 sale of liquor by a pharmacist a perpetual injunction should issue against him restraining such sales and he should be taxed with the costs, and the owner of the building should also be enjoined from permitting the premises to be used as a place for illegal sales; although the violation of the statute was technical and without criminal intent, and although the owner had no knowledge of the illegal sales.

*Appeal from Tama District Court.*—HON. J. M. PARKER,  
Judge.

SATURDAY, JANUARY 13, 1912.

ACTION in equity to enjoin the maintenance of a liquor nuisance. There was a decree for the plaintiff from which both parties appeal. As the defendants' appeal was first perfected, the defendants will be designated as appellants.—*Affirmed.*

*C. E. Walters*, for appellants.

*E. R. Acres*, for appellee.

McCLAIN, C. J.—The defendant, Foster, is a druggist having a permit for the sale of intoxicating liquors at the town of Gladbrook. The defendant, Rehder, is the owner of the building in which Foster conducts his drug store. No complaint of the violation of the intoxicating liquor law is made against Foster save that prior to the institution of this action, in May, 1910, he had in seven instances sold intoxicating liquors on requests which were irregular and insufficient because not in compliance with the specific requirements of chapter 139 of the acts of the 33d General Assembly, amendatory of Code, section 2394.

Without setting out the section and the amendment thereto in full, it is sufficient to say that a druggist holding a permit is prohibited from selling intoxicating liquors to any one in pursuance of such permit unless the applicant for such liquor signs a request in his true name, truly dated, specifying among other things "the actual purpose for which the request is made and for what use desired." It is further provided (in the amendment) that the blanks for such requests shall be furnished to the permit holder by the county auditor, and that the permit holder "shall require each applicant for liquor to fill out in his or her handwriting requests for same in ink." A blank form of request is incorporated into the statute. To avoid any confusion as to the applicability of this decision to the present law it should be noticed that by chapter 103, Acts of 34th General Assembly, passed since the judgment in the present case was rendered, it is provided that the blank request is to be filled out by the person making the sale. The recital of purposes for which sales may be made includes "medical purposes" and "specified chemical and mechanical purposes" (Code, section 2385) and the blank request provided for in the statute contains the recital that the liquor to be described therein "is desired for . . . use," the evident intention being that the purchaser may fill up such blank by insertion of the word "medical" or some description of a specified chemical or mechanical use, or by the description of some other use specified in the section of the Code last above referred to.

I. It appears, however, from the record that the county auditor furnished to defendant, Foster, at least two forms of printed requests, in one of which the word "mechanical" was printed before the word "use" in the statutory form above referred to, without any blank left before the word "mechanical" in which to write any specification; while in the other form the word "medical" was

<sup>1</sup> INTOXICATING  
LIQUORS: sale  
by druggist:  
specification  
of purpose.

thus inserted. From the language of the statute it appears that the insertion of the word "medical" in the statutory blank form was a sufficient description of the use for which the liquor was desired, but that the description of such use as "mechanical" was not sufficient without further specification. *State v. Swallum*, 111 Iowa, 37. The sale on a request for alcohol "for mechanical use" was therefore unlawful.

The objections urged to the requests in the other cases of sales shown by the record is that the defendant, Foster, himself, filled out the number of the request, the date, and his name and number as registered pharmacist, and also filled in the blanks left for the designation of the amount and kind of liquor applied for, requiring the applicant to fill out the blanks in the remaining portion of the requests. As already indicated, the statute required the applicant to fill out in his or her handwriting the request in ink. In the blank form given in the statute the blanks for the number of the certificate, the date, and the name and number of the registered pharmacist precede these words, "I hereby make request for the purchase of the following intoxicating liquors," following which words are blanks for the amount and the kind. It seems to us that the blanks preceding these words are not a portion of the request in such sense that they must be filled by the applicant. It would seem to be a sufficient compliance with the statute as it then stood if these blanks are filled by the pharmacist himself. On the other hand, the specification as to amount and kind is clearly a part of the request which the applicant makes and should have been filled in by himself in ink. We can see no distinction between amount and kind and the further specification as to the name, place of residence, and use, which plainly the applicant is required to designate for himself. Therefore, the filling in by Foster of the blanks left for the specifications of the amount and

2 SAME: requests  
for liquor:  
unlawful sale.

kind of liquor, was improper, and the sales made upon such requests were illegal.

II. The lower court did not err, therefore, in finding that Foster had been selling intoxicating liquors in violation of law and perpetually enjoining him from the illegal sale of intoxicating liquors on the premises and elsewhere within the judicial district; nor in enjoining defendant Rehder from permitting his premises to be used as a place for the illegal sale of intoxicating liquors; nor in taxing the costs against defendant Foster. It is immaterial that the violation of the statute proven was wholly technical, and, as it appears, without any criminal intent. *State v. Harris*, 122 Iowa, 78; *Rizer v. Tapper*, 133 Iowa, 628; *Long v. Joder*, 139 Iowa, 471; *Offil v. Westbrook*, 151 Iowa, 446.

III. The contention on plaintiff's appeal is that the trial court erred in not ordering an abatement of the premises as a nuisance as directed in Code, section 2408. It is well settled that proof of illegal sales by a druggist under a permit is sufficient to establish the character of the place in which such sales are made as a nuisance. *State v. Thompson*, 74 Iowa, 119; *McCoy v. Clark*, 104 Iowa, 491; *Barber v. Brennan, Judge*, 140 Iowa, 678. The court erred therefore in not entering an order of abatement as a part of the judgment in the case. *McCoy v. Clark*, 109 Iowa, 464; *Lewis v. Brennan, Judge*, 141 Iowa, 585.

The case will therefore be remanded to the lower court for a modification of the decree so as to order an abatement of the nuisance, which order shall apply to the premises described in the petition, for although it does not appear that defendant Rehder had had knowledge of illegal sales on the premises, the plain intention of the statute is that such an order shall issue as to the premises regardless of the knowledge of the owner that a nuisance had been maintained thereon. The statutory provision rendering the premises occupied and used for illegal purposes in the

business of selling intoxicating liquors liable for fines and costs only when occupied and used for such illegal purpose with the knowledge of the owner or his agent (Code, section 2422) evidently relates to the lien of the judgment and not to the order of abatement directed to be entered under Code, section 2408. When such order of abatement is entered the owner of the premises may, by complying with the conditions of Code, section 2410, including the filing of a bond, have said order canceled so far as it relates to his property; or if the defendants elect to do so, they may, under the provisions of the section last above referred to, have the action abated by complying with such provisions.

The case is remanded to the lower court for further proceedings in accordance with this opinion.—*Modified and affirmed.*

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J. W. BREM V. LENA SWANDER, Appellant.

**Parent and child: RIGHT TO CUSTODY: EVIDENCE.** A father has the  
1 primary right to and should be given the custody of his minor children as against all persons except the mother, unless he has waived or forfeited that right, or is an unsuitable person. In this action the evidence is insufficient to shown that the father acquiesced in the guardianship of his minor children by a relative of his wife, from whom he was divorced and with whom the children were living prior to her death; or that he was an unsuitable person to be intrusted with their care.

**Courts: PROBATE PROCEEDINGS: REVIEW ON APPEAL.** A proceeding to  
2 revoke the guardianship of minors and award their care and custody to a parent is in probate, triable as an ordinary action and not *de novo* on appeal, and therefore the exclusion of evidence to which no proper exception was taken will not be reviewed.

**Same: COURT FINDINGS: FORCE AND EFFECT.** The findings of the trial  
3 court in probate proceedings are entitled to the force of a verdict of a jury, if substantially supported by the evidence.

*Appeal from Des Moines District Court.*—HON. W. S. WITHROW, Judge.

THURSDAY, OCTOBER 19, 1911.

PROCEEDING in probate, in which it was asked by plaintiff that letters of guardianship of his two minor children, which had been granted to defendant, should be revoked, and that the care and custody of said children be awarded to him. The court canceled the letters of guardianship as prayed, and ordered that letters be issued to plaintiff. The defendant appeals.—*Affirmed.*

*Seerley & Clark*, for appellant.

*Power & Power*, for appellee.

MCCLAIN, J.—There is much conflict in the record as to the respective qualifications of plaintiff and defendant for guardianship of the children in question, but the following material facts are not in controversy: The plaintiff had been engaged in business in Burlington, at one time in partnership with his father-in-law, Mailandt; his business being that of a merchant tailor. Eight or nine years ago he removed with his family, consisting of his wife and three children, to California, where he was not successful in business, and where his wife seems to have been discontented. They returned to Burlington, and plaintiff resumed his business relations with Mailandt for about a year, and then returned to California, locating at San Diego, and leaving his wife and children with their relatives at Burlington. After about four months the wife went to California with the children and joined her husband, but she was still discontented, and after about six months, came back to Burlington. Before her departure from San Diego and in anticipation of his home being

broken up, and in order, as he says, that he might send his wife to a sanitarium, plaintiff tried to secure admission for the four children (another child having been born in the meantime) to a children's home, but he was able to secure such admission only for the two older. Thereupon, at the solicitation of his wife and her relatives, he sent her and the two younger children back to Burlington, where they lived with this defendant, a sister of the wife. Here the wife was in very poor health and died in December, 1909. But prior to that time this plaintiff had secured a divorce in California on the ground of desertion, and after the expiration of a year had remarried, and defendant had been appointed guardian of the two children in this state by the district court of Des Moines county. On the death of the wife, plaintiff appeared in the probate court in which the guardianship had been granted, and asked that the letters be canceled, and the custody of the children awarded to him.

It must be conceded that the father has a primary right to the guardianship of his minor children as against all persons save the mother; the right of father and mother

in this respect being equal. Code, section 3192. Therefore the plaintiff should prevail in this case unless he is found to be an

unsuitable person and the defendant a suitable person, so that the interests of the minors require that the natural and statutory right of the father should be disregarded. "There is no ground upon which the courts can interfere with the right thus recognized, except that of imperative necessity; that is to say, there can be no interference with the natural right of a parent except upon showing of gross misconduct, either willful or enforced, and in character such as to threaten serious and permanent detriment to the rights and interests of the child. No consideration such as the advantage of wealth, or social status, or even of personal affection, can of itself be sufficient. If the parent

1 PARENT AND  
CHILD: right  
to custody:  
evidence.

is a proper and competent person, and has not waived or forfeited his right, custody must be awarded to him." *Van Auken v. Wieman*, 128 Iowa, 476. And see to the same effect *Holmes v. Derrig*, 127 Iowa, 625; *Miller v. Miller*, 123 Iowa, 165. The conduct of a father, it is true, may be such as to amount to an abandonment or forfeiture of his primary right such as to justify the court in disregarding his claims. *Smidt v. Benenga*, 140 Iowa, 399; *Hadley v. Forrest*, 112 Iowa, 125; *McDonald v. Stitt*, 118 Iowa, 199; *Lally v. Fitz Henry*, 85 Iowa, 49.

But in this case there is no question of voluntary abandonment or forfeiture of parental rights. The plaintiff allowed his wife, with the two children, to return to Burlington on a visit to her relatives. He paid for their transportation, and made some provision for them by way of furnishing them with clothing. He wrote to the defendant about them, and sent them small sums of money. However inadequate may have been his contributions to their support, it must be remembered that they were absent from him at his wife's request and desire, and not at his own. The question is as to whether his failure to supply money for their return was involved in the proceeding for divorce on the ground of desertion, in which the wife was represented by counsel. There is no showing whatever that plaintiff ever held out to defendant the prospect that the children should remain permanently with her. Defendant assumed very soon an attitude of antagonism toward the plaintiff with reference to his wife and children. So long as the wife was living the plaintiff could not assert any paramount right of custody, and before the wife's death the appointment of defendant as guardian had been made. Immediately after the death of the wife, plaintiff instituted this action, asserting his right to their custody. Therefore at no time has defendant had any right to assume plaintiff's acquiescence in her permanent custody of the children.

The question to be decided, therefore, is simply this,

whether plaintiff is so far an unsuitable person for the custody of these children that the court will set aside his natural and statutory right, and, for the best interest of the children, award their custody to the defendant. As bearing upon the alleged disqualification of the plaintiff, there is evidence tending to show that while he lived in Burlington, he was somewhat unduly given to the drinking of intoxicating liquors, and was sometimes intoxicated, and that he treated his wife with harshness, and showed a continual lack of affection for her, and that he was cross and irritable with the children. According to the testimony of the older of the children whose custody is involved, the daughter, Esther, twelve years of age when examined, the lack of affection towards the mother and the irritability toward the children was also manifested in California, but she testified particularly as to relations existing during the first residence in California, and as to a time when she was only about seven years of age; and we think her testimony not entitled to very great weight for reasons which fully appear in the record and have been discussed by counsel, but which we do not feel it necessary to elaborate. The father and mother of the deceased wife, testifying for the defendant, admit that plaintiff's relations with his children were not characterized by any cruelty or hostility. On the other hand, it appears from the evidence that the plaintiff, while in very straightened circumstances when he went to San Diego, is now reasonably prosperous and financially able to care for his children, that he lives respectably, and that he and his present wife are maintaining a home in which the children will be surrounded with good influences.

Much is said in argument for appellant in regard to the circumstances attending the procurement by plaintiff of a divorce, and it is contended that plaintiff had, prior to the departure of his wife and these two children, entered into illicit relations with the woman who has become his present wife, that it was for this reason that his wife

desired to return to Iowa, and that the installation of this woman as housekeeper after his wife's departure, and his marriage to her as soon as the law would permit after the procurement of the divorce, characterize the plaintiff as an immoral person, unsuitable for the custody of these children. But there is no substantial evidence of improper relations between the plaintiff and the woman who subsequently became his wife either prior to the return of the first wife from California or between that time and the subsequent marriage after the divorce. There is some ground for surmise or suspicion if the testimony of the daughter Esther, in her direct examination, is to be accepted without qualification, but the circumstances referred to are such that she, as a girl of less than ten years of age when they occurred, might well have been mistaken in reference to their significance, and this is made plainly apparent from her testimony on cross-examination. We are quite inclined to the belief that this witness made the very natural mistake on the part of a child of her years of assuming things to be true as of her own knowledge about which she spoke only on information, which information itself was, in fact, based on nothing but inference. The real question is as to the present ability and fitness of the plaintiff to care for these children as father, and we would hardly be justified in overhauling his entire previous life for the purpose of seeing whether there was something discoverable which might give rise to a suspicion or even a belief that his conduct has not always been beyond proper censure. This is said particularly with reference to his conduct towards the mother of these children, which, as it seems to us, was censurable at least in lack of consideration and affection.

There was some testimony tending to show that the surroundings in which these children have been kept by the defendant have not been very suitable, and counsel for appellant devote the greater part of their argument to a vindication, based on the evidence, of the home of the

defendant as a place in which these children may properly and suitably be raised. On this question we have nothing to say, for it has not entered into our consideration of the result to be reached. We entertain no reasonable doubt as to the zeal and kindness of heart with which defendant has endeavored to discharge her self-assumed duty to these children. That they and their sisters who have continued to live with their father entertain a deep-seated affection for her as aunt, is apparent from the record. But we find nothing to indicate that, if these two children are restored to their father, they will not, within a reasonable time, be satisfied with their relations to him and his present wife. They have been separated from him for several years, and the separation had been under circumstances somewhat calculated to prejudice them against him. The youngest is now only six years of age, and therefore not old enough to have any deep-seated preferences. The girl, Esther, appears to entertain a prejudice against her father founded upon his treatment of her mother, which she may well abandon when she is established in his home. Under any circumstances, the affections of children for others than their parents are not sufficient in themselves to warrant the repudiation of the natural relationship of parent and child. It is of some significance, that as appears from the record, the two girls who have been kept with their father have been well raised, and are now in suitable surroundings in his home.

Counsel for appellant lay considerable stress on certain letters offered in evidence, written by these two girls to their sister and brother and their aunt in Burlington.

<sup>2</sup> COURTS: probate proceedings: review on appeal.

These letters were not received in evidence, as the court, on the exceptions of the plaintiff, reached the conclusion that they were not competent evidence in the case. Without assigning these rulings as error or pointing out any error of law committed by the court in their exclusion, counsel for ap-

pellant have printed them as part of the record, and relied upon them as they might have done in an equity case triable here *de novo* if the exclusion had been found to be erroneous; but, as we think they were properly excluded, we could not consider them even were the case before us in equity triable *de novo*. It is not, however, thus before us.

Proceedings in probate are triable as ordinary actions at law unless there is some special statutory provision to the contrary, and there is no such provision applicable to this case. It is only in equitable actions that a trial *de novo* is to be had on appeal to this court. See Code, section 3652. It is not, therefore, open to the appellant to have us consider evidence excluded by the lower court in the trial of the case. But, even were we in the situation to consider these letters, we should not deem them of controlling importance. If admissible, they would tend to show a desire on the part of the two girls in California, while their mother was still living, to visit their mother and sister in Burlington, which desire they were unable to gratify on account of the unwillingness of their father to give them the money necessary for the purpose. They also indicate some resentment towards their father on this account, and much sympathy with their mother as against him. But the testimony of the elder of these two girls, taken by deposition in California, counsel for the defendant being present and exercising their right of cross-examination, is quite contradictory to the general tenor of her letters, and it is quite significant that in the meantime she had in fact been allowed to visit her sister and brother in Burlington at defendant's house at her father's expense. In one of the letters the other sister complains that, while she is in school for the current year, she is to go to work after that, but it appears from the deposition that the girls were still both in school; the older one being about to graduate from the normal school. Taking all the situation into consideration, therefore, we are not at all im-

pressed with the force of the suggestion that, if these children are placed in the custody of the father, they will not be fairly treated and their interests properly cared for.

The suggestion already made that this case is not triable *de novo*, has further significance. The findings of the trial court are entitled to the force and effect of the verdict of a jury, and, if substantially supported by the evidence, we have no occasion to interfere with them. *Lally v. Fitz Henry*, 85 Iowa, 49; *McDonald v. Stitt*, 118 Iowa, 199; *Dankin v. Seifert*, 123 Iowa, 64; *Smidt v. Benenga*, 140 Iowa, 399. Even if this case were triable here *de novo*, we should, under a rule frequently announced, give considerable weight to the findings of the lower court so far as they are dependent upon the credibility of the witnesses testifying before it.

Under the record we find no occasion to interfere with the conclusions reached by the trial court, and its judgment is therefore *affirmed*.

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W. J. CONLY, Appellant, v. E. G. DILLEY, as Sheriff of Woodbury County, Iowa, and State of Iowa, on the Relation of JOHN D. HAMMOND, Appellee, v. CITY COUNCIL OF THE CITY OF DES MOINES, IOWA, AND OTHERS, Appellants.

**Statutes: CONSTRUCTION.** In all cases involving statutory construction the court will look not only to the particular provision under consideration but to the entire statute, on the assumption that each word and provision has been used for an intelligent purpose; and it is always proper and frequently necessary to consider other related statutes, especially those in existence when the one under consideration was enacted.

**Intoxicating liquor: STATEMENT OF CONSENT: TERMINATION: STATUTE.**  
 2 Chapter 101 of the Acts of the Thirty-First General Assembly changed the law under which a general consent to the sale of intoxicating liquor should continue in force until revoked by a

proceeding in the nature of a counter petition, and provided for an absolute and unconditional expiration by mere lapse of time, so that consent to an individual dealer by the municipal authority ceased with the termination of the general consent.

**Same:** EFFECT OF TERMINATION OF GENERAL CONSENT. The Act of the  
3 Thirty-Third General Assembly limiting the number of saloons in certain cities and towns, and providing that in cases where the number of resolutions of consent which had been granted exceeded the limit the council need not cancel a sufficient number to comply with the limitation, does not have the effect to extend the general consent beyond the time fixed by the Act of the Thirty-First General Assembly; so that an individual dealer had no rights under a resolution of the council based on a general consent which had expired by limitation under the latter statute.

**Statutes:** ENACTMENT: LEGISLATIVE RECORD: PRESUMPTION. The court  
4 will not presume that an amendment to a bill pending before the general assembly was adopted and became part of the law as enacted, simply on the strength of the fact that it was favorably reported by a committee of one branch of the assembly; but the reasonable presumption, arising from the fact that the bill as finally passed, enrolled and approved by the Governor did not contain the amendment is that the same was rejected, the legislative journal being silent as to its disposition subsequent to the report of the committee.

*Appeal from Woodbury and Polk District Courts.*—HON. DAVID MOULD and LAWRENCE DE GRAFF, Judges.

MONDAY, DECEMBER 18, 1911.

THE opinion states the nature of this litigation and the material facts to be considered.—*Affirmed.*

*Henderson & Fribourg and Will E. Johnston*, for appellant Conly.

*E. T. Morris, Thomas Sellers, and Guernsey, Parker & Miller*, for appellant City Council of Des Moines.

*E. A. Burgess, Fitzpatrick & Frantzen, and Lane & Waterman, amici curiae*, for appellants generally.

*George Cosson*, Attorney-General, *N. J. Lee*, Special Counsel, *John F. Joseph*, *H. H. Sawyer*, *C. T. Jepson*, County Attorney of Woodbury County, *Thos. J. Guthrie*, County Attorney of Polk County, *Popham & Havner*, and *Carl R. Jones*, for appellees.

WEAVER, J.—A statement of consent for the sale of intoxicating liquors in Woodbury county, Iowa, under the provisions of the statute known as the "Mulct Law" (Code, sections 2432-2455), was presented to the board of supervisors, and upon being duly canvassed, was adjudged sufficient on January 7, 1901. No appeal from that finding was ever taken. Under the statute then in force this consent would remain effective for its designed purposes until revoked according to law, subject of course to future legislation on that subject. Later the law was amended by the Thirty-First General Assembly (chapter 101), limiting the effect of petitions of general consent thereafter to a period of five years, and further providing that petitions of consent theretofore given and not otherwise revoked, should "become null and void" on and after five years from July 1, 1906.

On April 15, 1909, there was passed and approved a statute commonly spoken of as the "Moon Law," which is found in chapter 142 of the Acts of the Thirty-Third General Assembly. Section 1 of this act provides that no city or town council shall grant consent to sell intoxicating liquors as a beverage at retail, to a greater number than one to each 1,000 of the population of such municipality. By section 2 it is provided that in cities and towns, where, at the date of the passage of the act, the number of outstanding consents or permits was already in excess of the limit fixed by section 1, it shall not be mandatory on such councils to cancel or withdraw consents to bring the number within such limit, and such resolutions of consent may be renewed by city and town councils to the person or

persons holding the same or to their assignees or grantees, unless said resolutions become inoperative by reason of the person holding the same violating any of the laws of the state relating to the sale or disposition of intoxicating liquor, "in which event no new or additional resolution shall be granted to any person, except in accordance with the provisions of this act." Section 3 prohibits the giving of such consent to any person violating the liquor laws of the state and makes such disability continue for a period of five years. Section 4 reads as follows: "No resolution of consent granted by any city or town, in violation of the provisions of this act, shall be valid or of any force or effect, or operate as a bar against any of the penalties provided in chapter 6, title 12 of the Code, the supplement to the Code and amendments thereto and supplementary thereof, but nothing in this act shall operate to extend any consent now or hereafter granted beyond the time at which such consent shall expire as by law provided."

In December, 1909, in evident anticipation of the effect of the statute of the Thirty-First General Assembly hereinbefore referred to, and under which petitions of general consent would expire on June 30, 1911, a new petition was prepared and presented to the board of supervisors by which it was duly canvassed and found sufficient under date of December 31, 1910, which finding has never been set aside. At the time of the passage of the Moon law, and the subsequent transactions involved herein, the city of Sioux City had a population according to the last preceding census of about forty-seven thousand people, and there were outstanding resolutions of consent passed by its counsel to the number of seventy-eight, under which an equal number of places for the sale of intoxicants in said city were being maintained, and at no time since then has the number of such consents ever been reduced to an aggregate within the limit fixed by the Moon law.

On February 11, 1911, the city council of Sioux City

passed a resolution giving its consent to the plaintiff, W. J. Conly, to keep and maintain a place in which to carry on the business of retailing intoxicating liquors as a beverage, and on the same day a duly certified copy of that resolution was filed in the office of the county auditor. This resolution was passed as a renewal of a former consent given to Conly or to his grantor prior to the enactment of the Moon law and did not operate to increase the number of consents which were then outstanding. Relying upon this consent, Conly carried on said business to a date beyond June 30, 1911, when an information was filed against him and he was arrested on charge of selling intoxicating liquors in violation of law. The information sets out in detail most of the facts hereinbefore recited and concedes that if the resolution of consent granted to Conly on February 18, 1911, was an authorized act under the statutes of this state then existing, then he is not guilty of the offense with which he is charged; but it avers, and such is still the contention of the appellees, that the council could not lawfully give such consent, and notwithstanding the fact that said Conly has otherwise, in all respects, conducted his business in accordance with the mulct statute, he is not entitled to the benefit of the bar which that statute provides.

On being taken into custody by the sheriff, Conly instituted this proceeding in *habeas corpus*, alleging that his detention is illegal, in that the information shows upon its face that he is not guilty of any violation of law and because the statute of April 15, 1909, is unconstitutional and void.

Upon the hearing under this writ, the truth of the facts as contained in the foregoing statement was conceded by all parties, and upon consideration thereof the court announced its conclusions and judgment as follows:

First. The statement of general consent, filed January 7, 1901, terminated July 1, 1911, by operation of law.

Second. The general statement of consent filed December 30, 1910, was a new and original statement of consent, in no manner connected with the former statement, and the same did not curtail or extend any rights which may have been acquired under said former statement.

Third. Prior to the filing of the new statement of consent, December 30, 1910, the city council had no authority to grant permission to sell intoxicating liquors beyond the time when the statement of general consent then on file would expire, to wit, July 1, 1911.

Fourth. The resolution of consent granted to plaintiff's assignor expired July 1, 1911, unless the same was legally extended by some act of the city council, or was extended by operation of law.

Fifth. The filing of a new statement of general consent, December 30, 1910, did not operate to extend the resolution of consent granted by the city council; the city council alone having the authority to extend the resolution of consent granted by it.

Sixth. The city council had no authority to grant a new resolution of consent on February 18, 1911; there being more than forty-seven resolutions of consent outstanding and in operation.

Seventh. The city council had no authority on February 18, 1911, to grant a renewal of a resolution of consent to extend beyond July 1, 1911, there being more than forty-seven resolutions outstanding, and the same, in so far as attempting to authorize the sale of intoxicating liquors after July 1, 1911, was in conflict with section 4 of chapter 142 of the Acts of the Thirty-Third General Assembly.

Eighth. The defendant in selling and keeping for sale intoxicating liquors after July 1, 1911, was doing the same in violation of law, and his arrest and detention is legal.

It is therefore ordered, adjudged, and decreed that the plaintiff's petition be, and the same is hereby, dismissed, and that he remain in the custody of the defendant, the sheriff of Woodbury county, and that he pay the costs of this action taxed at \$——.

From this order and judgment the plaintiff has ap-

pealed. Involving the same proposition of law is the case of *Hammond v. City Council of Des Moines*; mentioned in the title to this opinion, and by agreement of parties and counsel, the two appeals have been argued and submitted together and will be disposed of in a single opinion.

The last-entitled case was brought in equity by a citizen of Polk county alleging that the population of the city of Des Moines according to the last official census is less than 87,000, and that under the limitation imposed by the Moon law, said council can not lawfully grant or issue more than eighty-six consents for the maintenance of places for the sale of liquors. It is further alleged that consents to the number of eighty-six have already been granted, and the council is about to increase that number beyond the legal limit, and an injunction is asked to prevent such illegal action. Answering the petition, the defendants admit the population to be as alleged by the plaintiff. They also admit that they have issued eighty-six consents to as many different parties to maintain liquor saloons in the city, and say that such consents have all been renewals of earlier consents issued prior to April 14, 1911. They further say that they subsequently adopted seven additional resolutions of consent, which, but for the pendency of this action, would be made of record and delivered to the parties in whose favor they were given, and that unless restrained from so doing, it is their intention to complete such record and make such delivery. On the trial of issues thus joined the parties stipulated that prior to the act of the Thirty-First General Assembly, limiting the period for which petitions or statements of general consent to five years and invalidating such consents as were then outstanding after June 30, 1911, a general consent of the voters of said city had been duly and regularly procured and never revoked. That under the authority thus conferred the council had issued, and at the date of the enactment of the Moon law there were then outstanding and unrevoked, ninety-five con-

sents to as many different persons to conduct liquor saloons in said city, all of which had been regularly and lawfully given, and up to the time of the trial of this case none of such permits had ever been surrendered or forfeited because of any violation of law by the party or parties holding the same. It was further admitted that in December, 1910, a new petition of consent by a majority of the legal voters of the city was presented to the board of supervisors of Polk county, by which board said petition was canvassed and adjudged sufficient. It was also admitted that on June 29, 1911, said council adopted eighty-six resolutions of consent for as many different saloons, all being renewals of consents originally issued prior to the passage of the Moon law, and that on June 30, 1911, said council passed seven other like resolutions in favor of seven other individuals having like qualifications with those included in said first list of eighty-six. It is further conceded that the persons to whom these consents have been given have in all respects complied with the provisions of the mulct statute if the resolutions of consent in excess of the eighty-six first granted were lawfully passed or if the council had legal right and authority under the statute to grant the same. Upon this showing the court entered a decree granting the relief prayed by the plaintiff, and the defendants appeal.

The sole question presented by this record is one of the construction and effect of the Moon law (chapter 142 of the Acts of the Thirty-Third General Assembly), with special reference to that part of said chapter which obviously undertakes for some greater or less period to relieve cities in which saloon consents were already outstanding in excess of one to each one thousand of population from the necessity of reducing such number to the required limit, save as such limit might be reached by voluntary surrender or forfeiture or by operation of law. The real inquiry, when reduced to its briefest terms, is whether this extension or grant of authority to maintain

the excess of saloons over and above the general statutory limit expired with the expiration of the petitions of general consent outstanding and in force at the date of the enactment of the Moon law, or whether it continues indefinitely so long as such petitions are succeeded by others which are duly canvassed and found sufficient as provided in the mulct statute.

To avoid confusion of terms it should be kept in mind that among the conditions precedent to the benefits of the mulct statute are two different "consents." The first, which constitutes the initial step to the securing of such benefits, is the consent of the requisite proportion of the electors which is evidenced by a written petition or statement to be canvassed by the board of supervisors. The second is the consent given by resolution of the city council to the individual applicant proposing to establish or conduct a liquor saloon. Other conditions of that privilege are not involved in these cases, and we need not consider them; but, without both of the consents mentioned, the bar of the mulct statute is not available.

The evident purpose of the Moon law is to impose a restraint or limit of some sort upon the authority of the city council to unduly multiply the number of consents to individual dealers, and of course, if the council disregard such limitation and grant consents in excess thereof, they can afford no protection to persons doing business under color of the authority so given.

At the time of the passage of that act, some of the cities of the state, acting under authority of the statutes theretofore existing, had, through their respective councils, issued consents materially in excess of the proposed limit, and the adoption of such limit without qualification would have imposed upon such councils the perhaps embarrassing responsibility of withdrawing consent from a sufficient number of individuals to bring the total within the requirements of the law. To meet this situation, certain qual-

sents to as many different persons to conduct liquor saloons in said city, all of which had been regularly and lawfully given, and up to the time of the trial of this case none of such permits had ever been surrendered or forfeited because of any violation of law by the party or parties holding the same. It was further admitted that in December, 1910, a new petition of consent by a majority of the legal voters of the city was presented to the board of supervisors of Polk county, by which board said petition was canvassed and adjudged sufficient. It was also admitted that on June 29, 1911, said council adopted eighty-six resolutions of consent for as many different saloons, all being renewals of consents originally issued prior to the passage of the Moon law, and that on June 30, 1911, said council passed seven other like resolutions in favor of seven other individuals having like qualifications with those included in said first list of eighty-six. It is further conceded that the persons to whom these consents have been given have in all respects complied with the provisions of the mulct statute if the resolutions of consent in excess of the eighty-six first granted were lawfully passed or if the council had legal right and authority under the statute to grant the same. Upon this showing the court entered a decree granting the relief prayed by the plaintiff, and the defendants appeal.

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ifications were attached to the bill to avoid an abrupt change of conditions and at the same time insure the final reduction (automatically or otherwise) of the number of consents in all cities to a point within the statutory maximum. Certainly, we can not attribute to the Legislature any purpose under the guise of a general statute to make an unconstitutional distinction between cities by which one may be forever relieved from obedience thereto while another is forever held to strict compliance with its terms. Let us then turn again to the very language in which these qualifications or modifications of the general terms of the statute is couched. Section 2 provides as follows: "In all cities and towns where a greater number of persons than are provided in section one hereof now hold resolutions of consent to sell intoxicating liquors at retail, it shall not be mandatory under the provisions of this act for city or town councils to cancel or withdraw a sufficient number of such resolutions of consent to comply with the provisions of section one hereof and such resolutions of consent may be renewed by city and town councils to the person or persons holding the same or their assignees or grantees unless such resolutions of consent shall become inoperative by reason of surrender or forfeiture," etc. Section 4 reads as follows: "No resolution of consent granted by any city or town council in violation of the provisions of this act shall be valid or of any force or effect or operate as a bar against any of the penalties provided in chapter 6, title 12 of the Code, the supplement to the Code, 1907, and amendments thereto and supplementary thereof, but nothing in this act shall operate to extend any consent now or hereafter granted beyond the time at which it will expire as by law provided." The legislative history of this act, as disclosed by the official journals, was offered in evidence in the trial court, and these records indicate that the final clause of section 4 was the last of several amendments attached to the bill before being put upon its passage. The

effect of this clause is the subject to which arguments of counsel are largely devoted. The appellants urge that section 2 clearly empowers the city council to renew all the consents outstanding at the date of this enactment, and that, so far as anything in that section is concerned, such renewals, unless surrendered or forfeited, may be extended indefinitely until the time comes when there is no longer existing any valid general consent of the electors, and this is so without regard to the fact that the original general consent has expired, providing it has been immediately succeeded by another. The final clause of section 4 they say has little or no effect except by way of giving emphasis to the thought that consents for which provision is made in section 2 shall not be given indefinite extension by mere force of the statute, but must depend upon being renewed from time to time just as would have been the case had this particular statute never been enacted.

In this, as in all cases of statutory construction, the court must look not only to the words of the provision or clause under discussion, but to the statute in all its parts.

**1 STATUTES: construction.** It must assume that each provision and each word has been employed for an intelligent purpose, and the enactment must be interpreted as a coherent whole; all its parts being given their proper effect. These are commonplaces of the law of statutory construction. To do this it is always proper and frequently quite necessary to take into consideration other statutes relating to the same general subject, more particularly those other statutes which were in existence when the one under investigation was adopted.

**2 INTOXICATING LIQUOR: statement of consent: termination: statute.** Now, it will be remembered, as we have already recited, that the Thirty-First General Assembly had so amended the mulct statute that petitions of general consent thereafter granted should remain effective for five years only, and that as to those already outstanding, they

should expire on June 30, 1911. It is worth while here to inquire as to the effect of this law.

Up to that time a sufficient petition of consent continued in force indefinitely until revoked by a proceeding in the nature of a counter petition. If a general consent was in force, city councils were authorized to grant consents to individual dealers annually; that is, the consent to the individual, unless renewed, would expire in one year. Some of the counsel appearing for appellants deny this limitation; but we think it clearly implied from the conditions laid down in Code, section 2448. Such, also is the practical construction which has quite generally been placed upon the statute by city councils throughout the state, and it has been so held by this court in *Fidelity Co. v. Jenness*, 138 Iowa, 725.

When therefore the Legislature undertook to deal with the bill enacted later into chapter 142 of the Acts of the Thirty-Third General Assembly, for the purpose of placing a limit on the number of saloon consents, it had to deal with the situation we have already outlined. There were numerous valid petitions of general consent outstanding, some of which (including all granted prior to the enactment by the Thirty-First General Assembly) would expire June 30, 1911, and others (including all which had become effective after that amendment) which would expire at different dates after June 30, 1911. Under these general consents, special or individual consents had been issued in excess of the proposed limit. To meet these conditions the bill was so amended in the second section as to permit the renewal of this excess of individual (annual) consents. Of this there can be no doubt. But how long does this privilege of renewal continue? Is that authority exhausted by a single renewal, or does it extend from year to year indefinitely? Does it cease with the life of the general consent then in force, or will it continue throughout each successive five-

3 SAME: effect  
of termination  
of general  
consent.

year period, so long as general consents continue to follow one another? If the bill had passed as it stood before the last amendment to section 4, these questions would not be at all easy of solution. To say the very least, the language of section 2 is by no means so full, clear, or explicit as to remove all doubt upon the propositions we have here suggested. This vagueness and uncertainty seem to have sufficiently impressed the minds of our lawmakers to induce the final amendment attached to the bill in these words: "But nothing in this act shall operate to extend any consent, now or hereafter granted, beyond the time at which such consent shall expire as by law provided." This language naturally suggests the inquiry: When do such consents expire as by law provided? Primarily it must be said that, under the construction we have put upon the mulct statute, all resolutions of consent expire with the annual period for which they are granted. It is argued for the appellants, however, that if this point be conceded, the statute preserves to the particular class of consents which we are here discussing, the right of renewal. Let that proposition be admitted for the purposes of this case, and we are next brought to consider the effect upon such individual consents of the expiration of the general consent, the fundamental condition precedent without which compliance with all other conditions is of no avail as a defense to a prosecution under the general prohibitory law. But, as we have already noted, the state has seen fit to put a definite limit of five years to the efficiency and life of every general consent, and it follows of necessity that consents given to individuals by the city council must cease and become of no effect with the general consent upon which they are dependent for their vitality. Whether the word "consent," as used in the last clause of section 4 of the statute, be construed to refer to the general consent of the electors, or to the resolution of consent by the council to an individual, or to both, the

result is the same. The act of the Thirty-First General Assembly, fixing the five-year limit, draws a line beyond which neither can pass. The question whether the electors will avail themselves of the privileges and immunities of the mulct law is then thrown open anew precisely as if it had never before been passed upon by them. No vested rights are acquired in one period which are carried over into another.

If any individual dealer is thereafter entitled to immunity or protection, it is because he holds the consent of the council based upon a new general consent, and not one based upon a general consent which has expired by statutory limitation. If this be the correct interpretation of the law, as we think it clearly is, there can be little difficulty in giving meaning and effect to all parts of the particular statute here under consideration. Reading sections 2 and 4 together with this view in mind, they provide in substance that the excess consents may remain in force and be renewed from time to time until the expiration of the general consent by virtue of which they were authorized. To hold otherwise is to say that section 2 has the effect to extend the protection of the general consent then in force beyond its general limit as passed by the act of the Thirty-First General Assembly, and the right to do so is expressly negatived by the last clause of section 4 of the act of the Thirty-Third General Assembly.

Counsel say that the "time at which such consent shall expire as by law provided" has reference solely to its expiration by revocation or forfeiture as provided by Code, section 2451. But why so narrow its application? After this section was enacted and before the passage of the Moon law, the Legislature had provided for an absolute and unconditional expiration of such consents by mere lapse of time, so that at the date of the latter act, every general consent was liable to expiration by revocation on a sufficient petition of the electors, or by

lapse of the five-year period. On what principle then shall we say that, in providing that section 2 of the Moon law shall not operate to extend any consent beyond the time at which it will expire by law, the Legislature had in mind only an expiration by forfeiture or by petition of revocation, and not an expiration by lapse of the statutory period? We discover no ground for the distinction.

Counsel press upon our attention, what is undoubtedly true, that the Legislature, facing the fact that some cities and towns had granted consents to individuals largely in excess of the limit about to be imposed, realized that a sudden and arbitrary elimination of such excess would work a measure of injustice to those who had entered the business and invested time and money therein on faith of the law as it then existed, and it was desired to provide some means by which that reduction could be brought about more gradually and the parties adversely affected by it given reasonable time to adjust themselves to the changed situation. Conceding all this, the construction we put upon the statute would appear reasonably well adapted to that end. Upon the passage of the act all the general consents then outstanding in the state had, under the restrictions imposed by the act of the Thirty-First General Assembly, from two to five years yet to run according to the respective dates of their origin, and it is certainly not a harsh or essentially unjust proposition to hold that the time thus afforded was sufficient to satisfy the most exacting sense of justice.

Counsel for appellant Conly have assailed the validity of the Moon law on the ground that it does not appear to have been passed with due regard for the provisions of our state Constitution. The precise point seems to be that the two houses of the Legislature did not concur in the same bill. Stated as briefly as practicable, the bill was first introduced in the Senate by which it was amended, passed,

4 STATUTES:  
enactment:  
legislative rec-  
ord: presump-  
tion.

and sent to the House. The House committee to which it was referred reported it back recommending four several amendments, among which was one which would have eliminated the final clause of section 4. Several days later the House Journal, page 1877, records that on motion of a member the Senate file in question with proposed amendments was taken up and considered. The journal then proceeds to say: "The following amendments were recommended by the committee." The amendments which follow this statement in the journal are two in number; the first being a verbal change in section 1, and the second is a change by which section 2 was made to read as it now appears in chapter 142 of the laws of that session. No reference is made to the other two amendments recommended in the original committee report. The record then proceeds with the statement that the "amendments were adopted," following which the previous question was ordered, the rules suspended, and the bill, being read the third time, was put upon its passage and passed by a yea and nay vote 71 to 25. The bill was then reported back to the Senate in the form of the present statute, where the amendments attached by the House were concurred in, and the bill as so amended was passed by a constitutional majority. Being duly enrolled, it was approved by the Governor and is published among the acts of that assembly. No objection is made that the bill, as published, is not identical with the enrolled bill signed by the proper officers and filed and preserved in the office of the Secretary of State. The record of the passage of the two House amendments is objected to because it is said to be a mere expression of opinion by the clerk or by the editor of the journal, and not a record of any actual proceedings. It is further urged, as we understand counsel, that because the committee recommended four amendments to the bill, and the journal records or mentions that two of them were adopted by the House, without anywhere disclosing what became of the

other two amendments, we must assume that all four received the sanction of the House, while the bill, as passed by the Senate, included the first two only. It is further urged that, as the report of the committee submitted four amendments, and as the journal of proceedings had, on the second reading of the bill, records that the "amendments were adopted," it must be presumed that all were adopted. These objections are not well taken. In the first place, it is extremely doubtful if the courts can properly go behind the enrolled bill to scrutinize the details of its legislative history for grounds upon which to hold it invalid. *Clare v. State*, 5 Iowa, 510; *Duncombe v. Prindle*, 12 Iowa, 1; 36 Cyc. 971. It may be that if the record affirmatively disclosed the adoption of an amendment which does not appear in the enrolled bill, or that such bill did not receive a constitutional majority of either House, or other vital defect of that nature, the court would not be bound to accept the enrollment and publication of an alleged statute as a finality; but we are here asked to go very much farther than the suggested case and to presume that the House did adopt certain amendments of which there is not the slightest record, except of the fact that they were recommended by a committee. The fact that the journal does not show what was done with these amendments may afford good ground to criticise the manner of keeping the record; but we know of no rule of law or reason by which we can presume they were adopted by the House. On the contrary, the reasonable presumption from the fact that only the other two expressly shown to have been adopted and the bill was reported in that form to the Senate, and in that form received the vote of the Senate and the approval of the Governor, and is so attested by the enrolled bill, is that the missing amendments as reported by the committee were duly rejected. See Am. & Eng. Ency. Law (2d Ed.) 556; *Weyland v. Stover*, 35 Kan. 545, (11 Pac. 355). Or if not formally rejected, and they

were in some manner overlooked and never brought to a vote, it could not be considered a fatal defect in the passage of the bill with such amendments as were in fact adopted.

There can be no question as to the identity and number of the House amendments adopted. They are set out in full in the record, and are but two in number. The court has been favored with numerous arguments by distinguished counsel, and we have given their carefully prepared briefs the thorough consideration to which they are entitled. This opinion, already of tedious length, can not be further extended to review the authorities cited. Our examination of them indicates that none can be considered as opposed to the conclusion we have hereinbefore indicated. For the reasons stated we think the judgment of the trial court in each of the cases here being considered is correct.

It should be said in closing that, while the court is united in the conclusion above indicated, some of its members do not wish to be committed to the holding that resolutions of consent provided for by the statute (Code, section 2448) must be renewed annually. In their judgment it is sufficient for the purposes of this appeal to hold that it is competent for the city council to issue resolutions of consent for a definitely fixed period and to renew the same from time to time as that period expires, but that no consent so given or any renewal thereof, shall have force or effect beyond the time when the general consent of the voters in force at the date of the resolution expires by statutory limitation.

For the reasons stated, the judgment of the district court in each of the cases herein considered must be, and it is, *affirmed*.

WILLIAM WILKE v. ILLINOIS CENTRAL RAILROAD COMPANY,  
Appellant.

**Carriers: INJURY TO LIVE STOCK: BURDEN OF PROOF.** Where an agent  
1 of the shipper of live stock accompanied the same for a portion  
of its transportation, and during that time it was claimed the  
stock was injured by exposure to heat, in seeking to recover dam-  
ages for the injury the shipper had the burden of proving that the  
exposure of the stock was the result of the defendant's negligence  
and not that of his agent.

**Same: REASONABLE CARE.** A carrier of live stock unaccompanied by  
2 the owner or his agent is only held to an exercise of reasonable  
care to avoid injury to the stock.

**Same: BURDEN OF PROOF: INSTRUCTIONS.** An instruction in an action  
3 for injury to live stock while in transit that the shipper has the  
burden of showing his freedom from negligence, will not give  
the carrier the benefit of the rule imposing on the shipper whose  
agent accompanies the stock, the burden of proving that the  
injury was the result of the carrier's negligence.

**Same.** Where the jury failed to agree on a verdict for plaintiff until  
4 after the court had given an additional instruction on the desir-  
ability of agreeing, if practicable, errors in the instructions as  
to the burden of proof and degree of care required of the de-  
fendant were prejudicial.

*Appeal from Hamilton District Court.—HON. R. M.*  
WRIGHT, Judge.

MONDAY, DECEMBER 18, 1911.

ACTION to recover damages for loss of hogs due to  
heat occurring while the animals were being transported  
on the defendant railroad. There was a verdict for the  
plaintiff, and from judgment on this verdict the defendant  
appeals.—*Reversed.*

*Wesley Martin* and *Kelleher & O'Connor*, for appellant.

*J. W. Lee* and *D. C. Chase*, for appellee.

McCLAIN, J.—Plaintiff shipped two car loads of hogs over defendant's road, one from Webster City, and the other from Wilke, to Chicago, the two cars being contained in the same train; and, when the cars reached their destination, some of the hogs were found to have died, according to plaintiff's allegations, as the result of excessive heat. The specific charges of negligence on which plaintiff asked to recover damages for his loss were that during transit, the day being very hot, the defendant left the train containing these two cars of hogs standing for several hours near Cedar Falls in a deep cut, where no breeze could reach them, and that notwithstanding notification from plaintiff that the animals were suffering from heat, and the request of plaintiff to defendant to move its train out of said cut to some place where the breeze could reach the animals so as to prevent injury to them from the excessive heat, defendant neglected and refused to move said train or to protect said stock or to furnish any relief for a long time thereafter, and that the injury resulting, could have been prevented by the exercise of ordinary care on defendant's part, and was not due to any negligence or carelessness on the part of the plaintiff. The defendant denied the allegations of negligence. Plaintiff then amended his petition by alleging that plaintiff delivered to defendant, the hogs referred to, in good, sound, healthy condition, and that, when the cars containing the animals arrived at their destination, a certain number of the hogs were dead, and those not dead were greatly shrunk in weight, and were sick and in bad condition, and that the death and unusual shrinkage and sickness referred to occurred while the hogs were in defendant's care and being

transported. To this amendment the defendant answered, denying the allegations, and alleging contributory negligence of plaintiff in loading and handling the animals while in charge of them during transportation, and that any loss occurring resulted from such contributory negligence, and from the sudden and unexpected rise in temperature and excessive heat. By way of reply the plaintiff denied the affirmative allegations in defendant's answer as amended.

During the introduction of the evidence, and in connection with the testimony of one Lloyd Bickford, who said that he accompanied the stock as the agent of plaintiff until the train reached Waterloo, which is east of Cedar Falls on defendant's line of road, where he got off the train in which the hogs were being transported, to eat dinner, and there missed the train on which the hogs were carried from Waterloo to Chicago, taking another train for that destination. The contract of shipment between plaintiff and defendant, signed also by the witness as the person in charge of and accompanying the stock, was offered in evidence, describing the car of hogs shipped from Webster City; and another contract in the same form, but signed by another person as the person accompanying the hogs, relating to the car load shipped from Wilke, was also introduced. In these contracts it was provided that the cars were to be in charge of the shipper or his agents while in transit, that the shipper assumed the duty of loading and unloading, and that the defendant company would not be liable for any loss or damage to the stock caused by heat or suffocation or for any loss or damage, however caused, nor resulting from gross negligence of defendant, and, further, that the shipper would at all times take care of the stock at his own expense and risk, free transportation being given to the shipper or his *bona fide* employee in charge of the stock for that purpose. At the conclusion of the evidence, defendant offered an amendment to its answer to

conform the pleadings to the evidence, alleging that the shipment was made under the two contracts above referred to, by the terms of which plaintiff agreed to take care of the stock and give it the necessary care and attention while the train was not in motion, and that he or his authorized employee would accompany the train for that purpose, and that, by reason of such contract, plaintiff could not recover on account of failure of defendant to water and care for the stock or on account of any of the other matters referred to in the contract as those which plaintiff agreed to perform. The court refused to permit the filing of this amendment on the ground that the defendant must have had as much knowledge as the plaintiff in regard to the existence of these contracts at the commencement of the suit, and that the court had made rulings on the introduction of evidence under the pleadings as they existed, which would have been erroneous if the contracts had been pleaded before the evidence was introduced.

The principal complaint on behalf of appellant is as to the giving of instructions in which it was assumed that the amendment to plaintiff's petition alleging that the hogs were alive and in good, sound, healthy condition when delivered to defendant for shipment, and that, when they arrived at their destination, some of them were dead, and the others greatly shrunk in weight and sick and in bad condition, such loss and damages occurring while the hogs were in defendant's care during transportation, stated an independent cause of action, with reference to which the jurors were instructed that proof of the fact alleged by a preponderance of the evidence would require a verdict in favor of plaintiff unless the jury should "find that the defendant has established, by a preponderance of the evidence, its second defense, in which event your verdict should be in favor of the defendant;" the second defense being that the plaintiff was in charge of the stock during shipment, and that any loss occurring during said shipment,

by reason of sudden rise in temperature and excessive heat, was chargeable to plaintiff, and, further, that such loss was due to the contributory negligence of plaintiff, and not to the negligence of the defendant. And, in this connection, the court further charged that the verdict should be in favor of the defendant if it had been shown by a preponderance of the evidence that with respect to the stock defendant "exercised the highest possible degree of foresight, pains, and care reasonably to be expected of it." In another instruction the jurors were told that, if plaintiff had proved that the stock "was in good condition when delivered to the carrier, but was in bad condition when it arrived at destination, the burden of proof is on the carrier to show by a preponderance of the evidence, in order to avoid liability, that it exercised with respect to said stock the highest possible degree of foresight, pains, and care reasonably to be expected of it."

In the case of *Colsch v. Chicago, M. & St. P. R. Co.*, 149 Iowa, 176, finally decided in this court after the trial of the present action in the lower court, it was held that for injuries resulting to live stock during transportation, by reason of changes in temperature, the common carrier is not liable as an insurer, but only for negligence; and that if the owner or his agent accompanies the stock, the burden is on him to show that negligence of defendant occasioned the injury, and that in such cases no presumption of negligence arises merely from proof of the fact of loss or damage, the shipper in charge of the stock during transit being presumed to know the cause of such loss or damage as well as the carrier. On the other hand, the rule is recognized in that case that, if the shipper or his agent does not accompany the stock in charge of it, the burden rests upon the carrier, which alone is presumed under such circumstances to have knowledge of the fact to prove by a preponderance of the evidence that the loss or damage did not result from any cause attributable to defendant's negli-

gence. The reasons for these rules are fully stated in that opinion, and need not be elaborated here. See *Mosteller v. Iowa Central R. Co.*, 133 N. W. (Iowa), 748, decided at present term. In view of these rules, we have no difficulty in reaching the conclusion that the instructions above referred to were erroneous to defendant's prejudice.

In the first place, it appears beyond question that the agent of the plaintiff did accompany the stock during at least a portion of the transportation for the purpose of caring for it, and that the only undue exposure to heat which the evidence tended to establish occurred during the time when the stock was accompanied by and in charge of defendant's said agent. To this extent at least the burden was on the plaintiff to show by a preponderance of the evidence that such exposure was the result of, or was contributed to by, defendant's negligence without the fault or neglect of the agent of plaintiff.

In the second place, the instructions would have been erroneous even in the absence of any evidence that plaintiff or his agent accompanied the stock, in requiring defendant to show by a preponderance of the evidence that with respect to the stock, defendant exercised the highest possible degree of foresight, pains, and care reasonably to be expected of it. The measure of care required of the carrier to avoid injury to the stock in transport from changes in temperature is reasonable care, and not the highest possible degree of care. *Colsch v. Chicago, M. & St. P. R. Co.*, *supra*.

The trial court did not in any of its instructions refer specifically to the fact that plaintiff's agent accompanied the stock as having any bearing on the sufficiency of the evidence as to defendant's negligence. Something was said with reference to the burden of proof resting on plaintiff, under the issue raised by its original petition and the answer thereto relat-

1. CARRIERS: injury to live stock: burden of proof.

2. SAME: reasonable care.

3. SAME: burden of proof: instructions.

ing to the specific negligence charged in stopping the train on a very hot day in a deep cut, and keeping the stock in that situation for a long period of time, resulting, as alleged, in loss of and damages to plaintiff's hogs, to show by a preponderance of the evidence that plaintiff was himself free from any negligence contributing to such injury; but this did not give to the defendant the full benefit to which it was entitled under the issue raised under the amendment to the petition of the fact that plaintiff's agent did accompany the stock during the period of this specifically alleged negligent conduct of the defendant. The court seems to have assumed that without the amendment to its answer offered by the defendant at the conclusion of the evidence, which the court refused to entertain, relating to the contract of shipment, there was nothing in the case to render the fact that plaintiff's agent accompanied the stock in any way material. As will appear from an examination of the opinion in the *Colsch* case, *supra*, it is evident that the fact was material not as affecting the degree of care, but as affecting the burden with reference to proof of defendant's negligence, and that for this purpose it is the fact rather than the specific contract which is controlling. If, in fact, the shipper or his agent, with the carrier's consent, accompanies the stock during transportation for the purpose of caring for it so far as practicable, then the shipper is in as good a position as the carrier to know what was the cause of the loss or injury, and whether such loss or injury was the result of the carrier's negligence, and the burden of proving the carrier's negligence therefore remains in the nature of things with the plaintiff to show that as to matters reasonably within his knowledge while accompanying the stock the fault occasioning the injury was not his but that of the carrier. *Grieve v. Illinois Central R. Co.*, 104 Iowa, 659; *Terre Haute, etc., R. Co. v. Sherwood*, 132 Ind. 129 (31 N. E. 781, 17 L. R. A. 339, 32 Am. St. Rep. 239), and note; *St. Louis & S. F.*

*R. Co. v. Wells*, 81 Ark. 469 (99 S. W. 534); *Libby v. St. Louis, I. M. & S. R. Co.*, 137 Mo. App. 276 (117 S. W. 659); *Cleve v. Chicago, B. & Q. R. Co.*, 77 Neb. 166 (108 N. W. 982, 124 Am. St. Rep. 837); 15 Am. & Eng. Ann. Cas., 33, and note.

It appears from the record that the jurors were unable to agree for more than twenty-four hours after the case was submitted to them, and only reached a final

agreement after the court had given an additional instruction as to the desirability of reaching a decision if practicable, by giving proper regard and deference each to the opinions of the others. No complaint is made of this instruction, but the fact that the court found it necessary to give such an instruction indicates that errors of the court in the instructions given with reference to the burden of proof and the highest possible degree of care may have had a very material bearing upon the action of the jury. We can not avoid the conclusion, therefore, that the errors pointed out may have been so far prejudicial as to require the reversal of the judgment.

Other alleged errors in the trial of the case are relied on for appellant, but, if the case is retried in accordance with the rules indicated in this opinion to be applicable to it, the errors complained of, if indeed in these other respects errors were committed, are not likely to occur and further discussion would be of no advantage.

The judgment must be *reversed*.

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STATE OF IOWA, Appellant, v. FAIRMONT CREAMERY COMPANY OF NEBRASKA, Appellee.

**Constitutional law:** STATUTES: CONSTRUCTION. Laws of a general nature must be uniform in their operation and contain no grant of special privilege or immunity to any citizen or class of citi-

zens; but they must also be clearly and palpably in violation of the constitution to render them invalid in such respects. The mere fact that a statute is limited to comparatively few persons in its operation, if the classification is substantial and reasonable, is not sufficient to condemn it.

**Same: UNIFORM OPERATION: CLASSIFICATION.** A classification of subjects of legislation must be based upon a reasonable and substantial distinction, which differentiates one class from another, so as to suggest the necessity of different legislation as to such classes; and in determining the reasonableness of a statute in this respect courts will take note of matters of common knowledge and report.

**Same.** The constitution announces certain basic principles which must be observed in the enactment of statutes, but it will not be given a technical and strained construction to impair the efficiency of the legislature in dealing with problems affecting the public welfare, such as unfair competition. And where a statute is directed against a particular evil of that character, it will not for that reason alone be regarded as arbitrary in its classification. Thus the Act of the Thirty-third General Assembly providing that the buying of milk, cream or butter fat for manufacture, or of poultry, eggs and grain for storage, shall be considered unlawful discrimination and shall be punished, when carried on for the purpose of destroying the business of a competitor by paying more for such commodities in one locality than in another, after making an allowance for the difference in quality and cost of transportation, is not in violation of the constitutional provisions relating to uniformity of laws and special privileges, the classification being reasonable and substantial, although the practical operation of the act is limited to comparatively few people.

**Statutes: ENACTMENT: SUFFICIENCY OF TITLE.** It is not necessary that the details of the subject matter of a legislative act be set forth in its title, but if the title gives a fair key to the contents of the act it will be sufficient. In the instant case the title of the original act, of which the one in question is amendatory, described the act as one to prohibit unfair discrimination between different sections, communities or localities, or unfair competition, and provided penalties. The title of the amendatory act referred to the law as it appears in a certain section of the Code, relating to unfair discrimination between different sections, communities or localities, defining the same and providing penalties therefor. The objection to the title of the amendatory act was that it did not contain any indication that the later act embraced discrimination in commodities not included in the original act. *Held*, that as the

act was amendatory its subject as stated in the title was appropriate to the contents of the act and therefore sufficient.

**Criminal law:** APPEAL BY STATE: SCOPE OF REVIEW. The defendant  
5 against whom an indictment has been dismissed can not be affected directly by a reversal on the state's appeal, and the appellate court therefore need only review such questions as are presented and argued by the state.

*Appeal from Buena Vista District Court.*—HON. A. D. BAILIE, Judge.

MONDAY, DECEMBER 18, 1911.

THE defendant was indicted in Buena Vista county, under the provisions of section 5028-b, Code Supplement, as amended by chapter 222 of Acts 33d General Assembly. Upon motion of the defendant at the close of the State's evidence, the trial court dismissed the indictment and discharged the defendant. The state has appealed.—*Reversed.*

George Cosson, Attorney-General, and W. C. Edson, County Attorney, for the State.

*Hainer & Smith and Faville & Whitney*, for appellee.

EVANS, J.—The discharge of the defendant in the trial court is final and can not be disturbed by us on this appeal. The state has taken an appeal for the purpose of obtaining a review of the holding of the trial court as to the constitutionality of the statute upon which the indictment is based. The statute in question purports to be an amendment to section 5028-b of the Code Supplement, and is as follows:

Any person, firm, company, association or corporation, foreign or domestic, doing business in the state of Iowa and engaged in the business of buying milk, cream or butter fat for the purpose of manufacture, or of buying poul-

try, eggs or grain for the purpose of sale or storage, that shall, for the purpose of creating a monopoly or destroying the business of a competitor, discriminate between different sections, localities, communities, cities or towns of this state by purchasing such commodity or commodities at a higher price or rate in one section, locality, community, city or town than is paid for the same commodity by said person, firm, company, association or corporation in another section, locality, community, city or town, after making due allowance for the difference, if any, in the grade or quality, and in the actual cost of transportation from the point of purchase to the point of manufacture, sale or storage, shall be deemed guilty of unfair discrimination which is hereby prohibited and declared to be unlawful, but prices made to meet competition in such locality shall not be in violation of this act; and any person, firm, company, association or corporation or any officer, agent, receiver or member of any such firm, company, association or corporation found guilty of unfair discrimination as defined herein, shall be punished as provided in section five thousand twenty-eight c (5028-c) of the Supplement to the Code, 1907.

This statute was assailed in the court below as unconstitutional on two grounds, namely: (1) That it was in violation of sections 1, 6, and 9 of article 1, and of section 30 of article 3, of the Constitution of Iowa, and of section 1 of the fourteenth amendment to the Constitution of the United States. (2) That it was in violation of section 29, article 3 of the Constitution of Iowa, in that the subject of the act was not expressed in the title, as required by such section of the Constitution. The trial court sustained both grounds of the attack upon the constitutionality of the statute, and we are required to review such holding. The questions thus presented will be considered in the order stated.

Section 6 of article 1 of the Constitution of Iowa is as follows: "Laws Uniform. Sec. 6. All laws of a general nature shall have a uniform operation; the General Assembly shall not grant to any citizen or class of

citizens, privileges or immunities which upon the same terms, shall not belong to all citizens." We need not quote the other provisions of the Constitution above referred to, because all must be tested by the same considerations so far as they relate to the first ground of attack, and we shall have no need to discuss them separately.

It is urged by appellee that the act is discriminatory and arbitrary in its classification. Not only is the act limited in its application to the business of buying milk, cream, butter fat, poultry, eggs, and grain, but it is further limited to particular methods of pursuing the same. It operates upon the business of buying milk, cream, and butter fat only when such articles are bought for the purpose of manufacture, and it operates upon the business of buying poultry, eggs, and grain only when the same are bought "for the purpose of sale or storage." The argument directed against the statute is not without its cogency. If it were presented to a legislative committee, it might properly cause hesitation as to the particular form of the proposed legislation; but the courts have neither advisory nor veto powers over legislation as such. And even though the court may entertain great doubt as to the constitutionality of a particular legislative act, it may not interpose such mere doubt against the legislative prerogative. It is only when the violation of the Constitution is "clear and palpable" that the court is justified in rendering nugatory a legislative act.

To speak accurately, the constitutionality of an act is not dependent upon an affirmative holding to that effect by the court. It is the province of the court only to determine whether a legislative act in question is or is not "clearly, plainly, and palpably" unconstitutional. The legislative and executive departments of government are under the same responsibility to observe and protect the Constitution as is the judicial department. This respon-

1. CONSTITU-  
TIONAL LAW:  
statutes:  
construction.

sibility is always present in the enactment by the Legislature, and approval by the executive, of all legislation. The constitutionality of all proposed legislation must be determined in the first instance by such co-ordinate branches of the government. Within the zone of doubt and fair debate such determination is necessarily conclusive. For the court to enter that zone would of itself be an offense against the Constitution. But when a legislative act is clearly and unmistakably unconstitutional, then the court must so declare. By common consent such a declaration is not deemed as usurpation by the court, but as a protest against usurpation already done. In such a case the court furnishes the only means of authoritative protest possible to the body politic. The responsibility which thus falls upon the judicial branch is an extraordinary one. It is the duty of the court to meet it fully and fairly and without evasion. On the other hand, it performs the duty with scrupulous regard for the prerogatives of the co-ordinate branches of the government and without lust of power. Hence the rule which obtained in an early day, and which has been adhered to strictly ever since, that the court will declare a law unconstitutional only when it is "clearly, plainly, and palpably so." See *Morrison v. Springer*, 15 Iowa, 304. In *Santo v. State*, 2 Iowa, 165, it was said that the case presented must be "clear, decisive, and unavoidable." To the same effect are *Stewart v. Board of Supervisors*, 30 Iowa, 14; *Sisson v. Board of Supervisors*, 128 Iowa, 464; *McGuire v. C., B. & Q. R. R.*, 131 Iowa, 340; *Hubbell v. Higgins*, 148 Iowa, 36.

In the last cited case we said: "It is well settled that the courts will not declare unconstitutional an enactment of the Legislature unless it is clearly and palpably so. The power of the courts to nullify the act of a co-ordinate branch of the government is one of grave importance. Its exercise has always been recognized by all the departments of government as essential to the well-being of

the body politic. But the power is one which the courts exercise with great caution and with the highest regard for the prerogatives of the legislative department. With the wisdom or the advisability of the legislation the courts have nothing to do. That question must be argued before the legislative tribunal."

The previous utterances of this court in that regard are in harmony with those of the Supreme Court of the United States. *Booth v. Illinois*, 184 U. S. 431, (22 Sup. Ct. 425, 46 L. Ed. 623); *Atkin v. Kansas*, 191 U. S. 223, (24 Sup. Ct. 124, 48 L. Ed. 148); *Holden v. Hardy*, 160 U. S. 397, (18 Sup. Ct. 383, 42 L. Ed. 780). Obedient to this rule, we pass to a consideration of the main question.

Does the act in question offend against the Constitution in that its operation is not uniform, or in that it grants immunities to some classes of citizens which are withheld from others? That the act constitutes special legislation, and that its practical application will be limited to comparatively few persons, must be conceded. But this is not sufficient to condemn. A very large part of all legislation is subject to this characterization. *McAunich v. Railroad Co.*, 20 Iowa, 338; *Railroad Co. v. Mackey*, 127 U. S. 205, (8 Sup. Ct. 1161, 32 L. Ed. 107).

It is urged by appellee that the classification adopted in the act is purely arbitrary and unreasonable, and that it rests upon no natural basis. No very definite rule has ever been laid down whereby the reasonableness of a statutory classification may be determined. In the very nature of the case no definite rule is possible for such pur-

2. SAME: uniform operation; classification.

lation must extend to and embrace accurately all persons who are or may be in like circumstances. For a collation of the utterances of the courts on this question, see *Hubbell v. Higgins, supra*.

The act under present consideration applies only to persons engaged in the business of buying milk, cream, poultry, eggs, and grain. Is this classification arbitrary and capricious, or does it arise fairly out of existing conditions? Has the statute fairly aimed at a particular evil, whether real or apparent, and is the classification as comprehensive as the supposed evil practice which is sought to be restrained? Professedly, the act undertakes to promote fair competition in the purchase of the commodities enumerated therein.

For the purpose of the consideration of the reasonableness of the classification in question, we must take note of matters of common knowledge and of common report. *McGuire v. C., B. & Q. R. R., supra*; *Chicago, B. & Q Ry. Co. v. McGuire*, 219 U. S. 549, (31 Supt. Ct. 259, 55 L. Ed. 328).

One of the great legislative problems of the day is to protect fair competition in the business world without unduly interfering with the freedom of contract. We may properly presume that the problem is greater in some lines of business than in others. In the purchase of commodities, the methods of business adopted are quite as various as the different commodities. Methods are adopted which are peculiar and limited to dealings in a certain commodity. Evil practices, therefore, may arise in the business methods pertaining to one commodity, which do not obtain at all in relation to other commodities. Practices may obtain which contravene no statute, and which, nevertheless, would be deemed as morally dishonest and detrimental to the public interest. If it be true that large corporations enter the creamery business and cover a large territory, including

3. SAME.

many purchasing points, and if it be true that they resort to methods which would be deemed morally dishonest and unjust in order to obtain a monopoly of the creamery business in the territory which they so occupy, then a situation is presented which fairly calls for legislative attention. The legislative problem thus presented is manifestly a difficult one. The resulting legislation may not be the best. But a legislative act which is directed against such *particular* evil ought not for that reason alone to be regarded as capricious and arbitrary in its classification. The particular methods which are condemned by the legislative act under consideration are set forth therein. It is quite manifest that a company sufficiently large in its capital and in the scope of its business could obtain a monopoly for itself in whatever territory it chose, by adopting the methods which are enumerated and prohibited in the statute. The temporary maintenance of artificial prices for the sole purpose of destroying a weaker competitor and creating a monopoly is one of the modern evil inventions. All that is required for its sure success is that there be great inequality of financial resources in favor of the offending party. A multitude of people buy milk and cream for immediate consumption. Comparatively few buy milk and cream "for the purpose of manufacture." To the multitude who buy for immediate consumption, a monopoly would be quite impossible, and its attempt quite absurd. But those who buy milk and cream "for the purpose of manufacture" sustain a distinctly different relation to the trade and to the community in which they operate. The magnitude of their operations is limited only by the magnitude of their resources. The motive to monopolize is present as well as the ability to reap its fruits when acquired. In the nature of the case, the discriminations which are condemned in the legislative act are practicable as a practice only to those who engage in the business on a large scale. We are impressed, therefore, that the classification adopted

is one which arises quite naturally, and that it rests upon a substantial and practical distinction. Substantially the same reasoning is applicable to those persons who "buy poultry, eggs, and grain for storage." The argument may require modification in its detailed application to the latter class; but we will not dwell longer upon it.

The Constitution was intended to announce certain basic principles to serve as the perpetual foundation of the state. It was not intended to be a limitation upon its healthful development, nor to be an obstruction to its progress. New days bring new problems. Legislation must meet these problems as they come; otherwise our plan of government must prove inadequate. Manifestly, we ought not to be swift to adopt such a technical or strained construction of the Constitution as would unduly impair the efficiency of the Legislature to meet its unavoidable responsibilities.

Turning to our own previous cases, great liberality has always been indulged in the matter of classification. In *McAunich v. Railroad*, 20 Iowa, 338, the rule is stated as follows: "Such laws are general and uniform, not because they operate upon every person in the state, but because every person who is brought within the relations and circumstances provided for is affected by the law. They are general and uniform in their operation upon all persons in the like situation, and the fact of their being general and uniform is not affected by the number of persons within the scope of their operation."

From *McGuire v. C., B. & Q. R. R.*, *supra*, we quote as follows: "But the reasonable classification of persons for the purposes of legislation according to occupation, business, or other circumstances, by which one class or portion of the people is differentiated from other portions or classes, has often been held not to be a violation of this constitutional guaranty. The mere fact that legislation is special, and made to apply to certain persons and not to others,

does not affect its validity, if it be so made that all persons subject to its terms are treated alike under like circumstances and conditions."

To the same effect is *Hubbell v. Higgins*, *supra*. *Shaw v. Marshalltown*, 131 Iowa, 128; *Mumford v. Railway Co.*, 128 Iowa, 685. These cases are in harmony with the overwhelming weight of other authority. No court, perhaps, has spoken more frequently upon this particular subject than the Supreme Court of the United States. Its utterances are quite conclusive on the contention that the act under consideration was a violation of the fourteenth amendment of the Constitution of the United States. From *Gundling v. Chicago*, 177 U. S. 183, (20 Sup. Ct. 633, 44 L. Ed. 725), we quote as follows: "Regulations respecting the pursuit of a lawful trade or business are of very frequent occurrence in the various cities of the country, and what such regulations shall be and to what particular trade, business, or occupation they shall apply are questions for the state to determine, and their determination comes within the proper exercise of the police power by the state, and unless the regulations are so utterly unreasonable and extravagant in their nature and purpose that the property and personal rights of the citizen are unnecessarily, and in a manner wholly arbitrarily interfered with or destroyed, without due process of law, they do not extend beyond the power of the state to pass, and they form no subject for federal interference."

From *Carroll v. Greenwich Insurance Co.*, 199 U. S. 401, (26 Sup. Ct. 66, 50 L. Ed. 246), a case involving an Iowa statute, we quote as follows: "In view of these cases further discussion is unnecessary; but we will add a few words. While we need not affirm that in no instance could a distinction be taken, ordinarily, if an act of Congress is valid under the fifth amendment, it would be hard to say that a state law in like terms was void under the fourteenth . . . Many state laws which

limit the freedom of contract have been sustained by this court, and therefore an objection to this law on the general ground that it limits that freedom can not be upheld. . . . At the argument before us more special reasons were assigned. It was pressed that there is no justification for the particular selection of fire insurance companies for the prohibitions discussed. . . . If an evil is specially experienced in a particular branch of business, the Constitution embodies no prohibition of laws confined to the evil, or doctrinaire requirement that they should be couched in all-embracing terms. It does not forbid the cautious advance, step by step, and the distrust of generalities which sometimes have been the weakness, but often the strength, of English legislation. *Otis v. Parker*, 187 U. S. 606, 610, 611, (23 Sup. Ct. 168, 47 L. Ed. 323). And if this be true, then, in view of the possible teachings to be drawn from a practical knowledge of the business concerned, it is proper that courts should be very cautious in condemning what Legislatures have approved. If the Legislature of the state of Iowa deems it desirable artificially to prevent, so far as it can, the substitution of combination for competition, this court can not say that fire insurance may not present so conspicuous an example of what that Legislature thinks an evil as to justify special treatment. The imposition of a more specific liability upon life and health insurance companies was held valid in *Fidelity Mutual Life Insurance Co. v. Mettler*, 185 U. S. 308 (22 Sup. Ct. 662, 46 L. Ed. 922). See, also, *Missouri Pacific Ry. Co. v. Mackey*, 127 U. S. 205, (8 Sup. Ct. 1161, 32 L. Ed. 107); *Orient Insurance Co. v. Daggs*, 172 U. S. 557, (19 Sup. Ct. 281, 43 L. Ed. 552); *Otis v. Parker*, 187 U. S. 606, (23 Sup. Ct. 168, 47 L. Ed. 323); *Home Life Insurance Co. v. Fisher*, 188 U. S. 726, 727, (23 Sup. Ct. 380, 47 L. Ed. 667).” See, also, *Southwestern Oil Co. v. Texas*, 217 U. S. 114, (30 Sup. Ct. 496, 54 L. Ed. 688); *Western Union v. Commercial Milling Co.*, 218 U. S. 406,

(31 Sup. Ct. 59, 54 L. Ed. 1088); *Griffith v. Connecticut*, 218 U. S. 563, (31 Sup. Ct. 132, 54 L. Ed. 1151); *Kentucky Union v. Kentucky*, 219 U. S. 141, (31 Sup. Ct. 171, 55 L. Ed. 137); *German Alliance Co. v. Hale*, 219 U. S. 307, (31 Sup. Ct. 246, 55 L. Ed. 229); *Brown v. Kentucky*, 217 U. S. 563, (30 Sup. Ct. 578, 54 L. Ed. 883); *Williams v. Arkansas*, 217 U. S. 79, (30 Sup. Ct. 493, 54 L. Ed. 673). See, also, *State v. Standard Oil Co.*, 111 Minn. 85, (126 N. W. 527.) Appellee relies upon *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540, (22 Supt. Ct. 431, 46 L. Ed. 679). That was a case involving a legislative act wherein certain persons or classes were expressly exempted from its provisions. The legislation was held invalid because of such exemption. If there is any inconsistency between such holding and that of the later cases of the same court, such fact does not aid the position of the appellee; the later cases being clearly against its contention. It is our conclusion at this point that it can not be said that the act under consideration is a clear and palpable violation of the constitutional provisions heretofore specified.

II. It is also urged that the act is unconstitutional as in violation of section 29, art. 3, of the Constitution of Iowa. This section provides that "every act shall embrace but one subject and matters properly connected therewith, which subject shall be expressed in the title." The contention here is the title of the act fails to express the subject. The act in question is concededly amendatory. The title to the original act (chapter 169, 31st General Assembly) is as follows: "An act to prohibit unfair commercial discrimination between different sections, communities, or localities, or unfair competition, and providing penalties therefor." The title to the amendatory act under consideration is as follows: "An act to amend the law as it appears in section five thousand twenty-eight-b (5028-b) of the Sup-

4. STATUTES:  
enactment:  
sufficiency  
of title.

plement to the Code, 1907, relating to unfair discrimination between different sections, communities or localities, defining the same and providing penalties for persons found guilty thereof." It is argued that the original act referred to "petroleum and its products" as the only commodity affected thereby, and that there is nothing in the title to the amendatory act to indicate in any way that other commodities would be included. This argument rests upon the assumption that the commodities referred to in the act constitute its subject whereas the contention of the appellant is that the essential subject of the act was "commercial discrimination, etc." It is doubtless true that both entered into the subject-matter of the legislation. Appellant contends, however, that the latter is the more comprehensive, and that the former is more in the nature of detail.

It is not necessary that the details of the subject-matter be set forth in the title. It is sufficient if the title affords a fair "key" to the contents of the act. *Sisson v. Board of Supervisors, supra*; *State v. Edmunds*, 127 Iowa, 339. Appellee relies upon *State v. Bristow*, 131 Iowa, 664, wherein the title was held fatally defective. The title in that case was "An act to repeal the law as it appears in section 1347-a of the Supplement to the Code relating to the vocation of peddlers *and to enact a substitute therefor.*" Acts 30th General Assembly, chapter 48. It will be noted that the legislation involved in that case was to repeal and to substitute. The title stated the subject of the law to be repealed, but was entirely silent as to the subject of the proposed substitute. In the case before us a subject is stated in the title. The question of dispute is whether the subject so stated is appropriate to the body of the bill. The question is not wholly free from doubt. It is our conclusion that the title is sufficient for the purpose of an amendatory act to forbid our interference on the ground of unconstitutionality.

The insufficiency of the indictment was laid as a ground of dismissal in the court below and was sustained by the ruling of the court. This ground is still urged by appellee in support of the ruling of the court. The state is the appellant. The defendant can not be affected directly by a reversal. The purpose of the appeal by the state is to obtain a review on particular questions of law. In such a case the state may select the rulings of the trial court which it desires to present for review. In its opening argument, the only questions pressed for our consideration by the state are those relating to the constitutionality of the legislative act. We will not, therefore, consider the question of the sufficiency of this particular indictment.

5. CRIMINAL  
LAW: appeal  
by state:  
scope of  
review.

Appellee filed a motion to dismiss the appeal, and such motion was submitted with the case. Since the filing of the motion, the grounds thereof have been cured by amendment to the abstract. It is therefore overruled.

In holding the statute to be unconstitutional we think the trial court erred. Its judgment must therefore be reversed.

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R. L. McFARLAND, Appellant, v. W. J. BOUCHER.

**Brokers:** EXCLUSION OF EVIDENCE: HARMLESS ERROR. In this action  
1 to recover a commission for finding a purchaser for land, defended on the ground of abandonment of the agency, the exclusion of plaintiff's testimony that he solicited others to purchase was not erroneous, as at the time it was offered no evidence of abandonment had been adduced and the excluded evidence therefore had no relevancy. But even if the ruling was erroneous it was not prejudicial, as the witness was subsequently permitted to testify to that fact.

**Same:** AGENCY: TERMINATION: BURDEN OF PROOF: INSTRUCTIONS. To  
2 entitle a broker to a commission for finding a purchaser for land he must establish the fact that the purchaser was found during

the existence of the agency; but when the agency has been established the owner has the burden of showing its abandonment prior to the production of a purchaser.

**Same.** Failure to instruct on the subject of abandonment of the  
3 agency was not erroneous, where there was no request for such an instruction, and those as given by the court were correct.

**Agency: DURATION.** When the duration of a broker's agency is not  
4 fixed it will continue for a reasonable length of time.

**Agency: ABANDONMENT: EVIDENCE.** Where a broker after repeated  
5 efforts to find a purchaser stated to the owner that he could not sell the place it indicated an abandonment of the agency.

*Appeal from Hardin District Court.*—HON. C. G. LEE,  
Judge.

MONDAY, JANUARY 13, 1912.

ACTION to recover commission for finding purchaser of land resulted in verdict for defendant, on which judgment was entered. The plaintiff appeals.—*Affirmed.*

*Lundy & Wood*, for appellant.

*Williams & Huff*, for appellee.

LADD, J.—In June, 1909, the defendant sold his farm to Frank Sheldon. Plaintiff claims that he found the purchaser, and in this action sought to recover a commission as agent for so doing. This was denied by defendant, who, while admitting that plaintiff had been his agent for that purpose, contended that such agency had terminated prior to the sale. That plaintiff first directed Sheldon's attention to the land in November, 1908, is undisputed, but his testimony that he again spoke to him in March or April, 1909, is contradicted by Sheldon. Plaintiff testified that in November, 1908, shortly before his vacation of fifteen days as United States mail carrier, he had a conversation

with defendant, in which the latter wanted him to find a purchaser for his farm at \$82.50 per acre, and said he would pay him \$1 per acre as commission, if he found one, to which plaintiff responded that he would see what he could do for him; that he would have his vacation, and could put in a little time at that, and would see if he could find a buyer; that during his vacation he had several parties out to look at the land; that several days after he had resumed work, defendant, at his suggestion, reduced the price to \$80 per acre; that defendant spoke about listing the land with others, whereupon plaintiff suggested he had done much work in connection therewith, and should have the exclusive sale for another week, and after that he would not object to putting it in another agent's hands; also that this was agreed to. The conditions of employment were not disputed, save that defendant testified to fixing the terms of sale at \$500 cash and balance on March 1st; and, further, that in a conversation after vacation, plaintiff had said he had one more customer to whom he might sell, and asked that the price be reduced; that defendant agreed to take \$80 per acre for the next few days; and that plaintiff came around a few days later, and said, "Well, I can't sell the place."

I. To the inquiry, "What else did you do in finding a purchaser for this land?" the plaintiff answered, "I solicited a good many other people." The answer was stricken out on motion. Counsel argue that the evidence was admissible as tending to show plaintiff had not abandoned the agency. See *Clements v. Stapleton*, 136 Iowa, 137. No evidence of abandonment had then been adduced, and, even, if it had been, there was nothing to indicate that the solicitations were subsequent to the alleged abandonment. There was no error; but, even if there was, the witness was allowed to testify subsequently of having talked to Sheldon and

1. BROOKS: exclusion of evidence: harmless error.

shown the place to another, and the ruling was without prejudice.

II. In the second instruction, the court told the jury that the burden was on plaintiff to prove his cause of action as alleged; and in the third instruction that if the plaintiff had shown by a preponderance of the evidence "that while said employment as agent continued, one Sheldon was induced to apply to defendant to purchase said farm," and as a result of negotiations, had purchased it, plaintiff was entitled to recover; but if the agency had terminated prior to that time, a verdict should be returned for defendant. This was correct, for the purchaser must have been found during the existence of the agency, and if so shown by a preponderance of evidence, this would suffice. Neither instruction can be construed as casting the burden of proof on plaintiff to negative the alleged abandonment of the agency. As contended, agency having been proven, the burden was on defendant to show that it was subsequently abandoned. *Clements v. Stapleton, supra*.

The jury was not instructed on the subject of abandonment, but, as the instructions given were correct, the omission to instruct on the burden of proof in this particular, in the absence of a request, was not error of which appellant may be heard to complain. *Harvey v. City of Clarinda*, 111 Iowa, 528; *Kid v. Pill & Medicine Co.*, 91 Iowa, 261; *Martin v. Davis*, 76 Iowa, 763.

III. Instruction 3½ is criticised. It is said the court erred in saying that if the period of the agency was not fixed, it would continue for a reasonable time. The rule was held to be as stated in the instruction in *Harris v. Moore*, 134 Iowa, 704.

The court also told the jury that, if "the plaintiff told defendant that he couldn't sell the place, or that in sub-

2. SAME: agency:  
termination:  
burden of  
proof: in-  
structions.

3. SAME.

4. AGENCY: du-  
ration.

stance, and the defendant understood from such conversation that plaintiff had abandoned the agency, and plaintiff did not, with defendant's knowledge, make further efforts to sell said premises, then said agency would be terminated." According to plaintiff's testimony, all he had undertaken was to "put in a little time" and "see if he could find a purchaser." If so, then a statement, if made by him, after repeated efforts, that he could not sell the place, plainly indicated that he had given up the attempt, and plaintiff had the right so to understand, and the court was not in error in so advising the jury.

The criticism of the fourth instruction is so manifestly unfounded that no consideration is required. The judgment is *affirmed*.

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FRANK SKVOR, Plaintiff, v. BERTHA WEIS, HENRY WEIS, her husband, GEORGE BEAR, MARY BEAR, his wife, SETH W. BEAR, MINNIE BEAR, his wife, HARRIET A. KULP, PHIA ELIZABETH BEAR, JESSE R. KEMPER, LILLIAN E. LEGLER, LILLA ANNA KEMPER, JOHN ALBAUGH, defendants, Appellants.

**New trial on petition: FRAUD.** The plaintiff in this action claimed  
 1 to have purchased the undivided interests of all the heirs in certain real estate of a decedent prior to a partition sale of the same, but after decree, and instituted action for specific performance of the contract, making the purchaser at the partition sale a party. The heirs assured the purchaser that the suit was not in good faith and that they would defend it and he entered no defense thereto. Some of the heirs made defense and default was entered against others and the purchaser, but later the decree against the the heirs only was set aside. Plaintiff failed to prove his case but entered into a secret agreement with the heirs for a sale of the land to him and decree was entered based upon this contract. *Held*, that the default against the purchaser was of no avail to the plaintiff, as he was not entitled to any relief against him; that the decree was a legal fraud on him and he was entitled to a new trial on petition.

**Same:** NEGLIGENCE OF PETITIONER. It is also held that the purchaser  
2 at the partition sale was not negligent in permitting default to  
be taken against him; and that as plaintiff is bound by the alle-  
gations of his petition, which did not warrant the decree entered  
against the purchaser, he can not avail himself of such claimed  
neglect.

**Same.** Nor did the fact that, subsequent to the default of the pur-  
3 chaser and decree against him, the plaintiff filed an amendment  
alleging that the defendant heirs had no further right to defend,  
because the purchaser had acquired their title and plaintiff had  
obtained an adjudication against him, tend in any manner to aid  
the plaintiff; but the subsequent decree based in part upon the  
amendment rather emphasized the wrong done. And the two  
decrees against the purchaser, in view of their provisions and  
the method by which they were obtained, constitute in effect but  
one adjudication and a legal fraud against which the purchaser  
is entitled to relief by way of a new trial on the merits of the  
case.

*Appeal from Linn District Court.*—HON. MILO P. SMITH,  
Judge.

WEDNESDAY, JANUARY 17, 1912.

PETITION for a new trial under the provisions of sec-  
tion 4091 et seq., of the Code. The petitioner is John  
Albaugh, one of the defendants in the above-entitled orig-  
inal case. His petition was denied by the trial court, and  
he has appealed.—*Reversed.*

*Deacon, Good, Sargent & Spangler*, for appellant.

*Lewis Heins*, for appellee *Frank Skvor*.

EVANS, J.—The determination of the petition for a  
new trial presented on this appeal involves a consideration  
of the proceedings had, not only in the original case above  
entitled, but of a certain partition case pending prior  
thereto. The original case in which the present petition

for new trial was filed was a suit in equity for specific performance of an alleged oral contract to convey land. The partition case was entitled "*Bertha Weis v. George Bear et al.*" The parties to the partition suit were the heirs at law of one Christian Bear. Such case involved no controversy, and the same attorney represented all interests therein. Prior to 1908, a formal decree had been entered in the partition case fixing and confirming the shares of the respective parties and ordering a sale of the real estate involved. Henry Weis, the husband of the plaintiff therein, was appointed as referee and ordered to sell the premises at public or private sale, except that he was forbidden to sell at private sale for less than the appraised price. The property consisted of a farm of one hundred and four and one-half acres and was duly appraised at \$125 per acre. On November 19, 1908, the property was regularly sold at public sale by the referee for \$113 per acre to John Albaugh, the petitioner herein. The sale and deed were duly reported to the court and duly approved on November 20, 1908, and one-third of the purchase price was paid as provided by the terms of the sale. On November 28, 1908, Albaugh was made a defendant in the action which is entitled as above, by the service of original notice upon him. The original petition in such action was filed by plaintiff Skvor on October 30, 1908. The action was brought by Skvor as plaintiff against all the heirs at law of Christian Bear as defendants. The averments of Skvor's original petition were that in August, 1908, he purchased the land involved in the partition suit by oral contract with Henry Weis as agent for the various owners of the undivided shares. On November 20, 1908, an amendment to the petition was filed naming John Albaugh as an additional defendant. In this amendment it was averred that Skvor's action was pending on November 19, 1908, and that: "John Albaugh was bound to take notice, and said John Albaugh bought subject to the rights of said

Frank Skvor, plaintiff herein. This amendment is filed bringing in as additional party John Albaugh, so that he may be bound by the decree to be rendered in this action." Albaugh carried the original notice which had been served upon him to the attorney for the heirs in the partition suit, and was assured that Skvor's claim was a "bluff," and that defense against it would be made. All the defendant heirs were nonresident except Bertha Weis, who was the plaintiff in the partition suit. On or prior to the April term, 1909, Bertha Weis and Henry Weis, her husband, appeared to said action. Original notice had been served by publication upon the nonresident heirs in time for the April, 1909, term. On April 15, 1909, the plaintiff took a decree by default against the nonresident heirs and John Albaugh, but no decree was obtained as to Bertha Weis and Henry Weis, and the case was continued as to them. Later in the term a motion was filed for the defaulted heirs to set aside the decree and the default, and this was later sustained, and such decree was set aside on such motion. Such motion did not in terms refer to John Albaugh, nor was any reference to Albaugh made in the order setting the decree aside. Plaintiff's contention, therefore, is that such decree has always remained in full force and effect as to Albaugh. After the setting aside of such decree, all the defendant heirs joined issue with the plaintiff denying the alleged contract. Thereupon the cause came on for trial January 13, 1910. The defendant heirs were not present in person at the trial, but were represented there by counsel and by Henry Weis. Pending the trial, and after the plaintiff's evidence had been introduced and he had rested, it was orally agreed before the court that a decree might be entered for the plaintiff, which was accordingly done. The decree, as entered, purported to enforce the original alleged contract sued on. This alleged agreement was that the plaintiff was to purchase the land at \$100 per acre. The real agreement, however, between the parties

whereby plaintiff obtained his decree, was made on January 14, 1910, pending the trial, and provided that Skvor should pay \$113 per acre for the land. The agreement between Weis and Skvor as to the price of \$113 existed only in parol between them and was not included in the decree. Albaugh first learned of it after the adverse decree had been announced, but before the formal decree had been entered of record. At about the same time, he first learned also that a decree had been entered against him, April 15, 1909. At the same term and on February 1, 1910, he filed his petition herein asking that the decree of April, 1909, and the decree of January, 1910, be both set aside, and that a new trial be granted. He based his petition upon the ground that fraud was practiced in obtaining the same, being the second ground specified in section 4091 of the Code. Subsequently all the defendant heirs except Bertha Weis joined him in such petition.

It is the contention of the plaintiff appellee that the appellant Albaugh was not a party to the trial of January, 1910, and is therefore in no position to obtain a new trial so far as such proceeding is concerned. He contends, also, that the petitioner was in default in 1909, and that the decree then entered against him was conclusive, and that he has alleged no fraud in relation thereto. It is also urged that the petitioner was neglectful in suffering default, and that he has never excused such default. Some other matters are urged which we will notice later in the discussion.

The theory presented by plaintiff's petition was that the alleged contract for the purchase of the property antedated the referee sale, and that the filing of his petition on October 30, 1908, operated as a notice of lis pendens to any purchaser at the referee sale. This theory appears to have been adopted by Albaugh. For the purpose of this appeal, therefore, and for such purpose only, we will adopt the same theory without in any manner announcing it as

a correct rule of law. Neither do we now intimate that it is an incorrect rule of law. Whether it might not be said that the prior pendency of the partition proceedings operated as a notice of lis pendens to the plaintiff, and whether he himself was not bound by the orders of the court entered in that case, is a question with which we will not now deal.

We may say, however, that, if Skvor had purchased only the undivided interest of some of the heirs, such a purchase would be subject to the partition proceedings and would only subrogate him to the rights of his grantors in such partition proceedings. Such a purchase would not obviate the necessity of a partition sale, nor would it prevent the passing of title to the purchaser at the referee sale. If, however, the purchaser should buy all the undivided interests, thus uniting in himself the complete title and obviating the necessity of a partition sale, it may be that in such a case he could ignore the partition proceedings and contest the right of ownership with a subsequent purchaser at a referee sale. We do not decide that question. The suggestion already made, that the purchaser of only an undivided part of the property could not, by the mere fact of such purchase, prevent the passing of the complete title to the purchaser at the referee sale, has some importance in the later discussion herein. Giving to the plaintiff the benefit of the assumption that he should prevail if he could prove a prior purchase in August, 1908, of the complete title, yet a failure to show that he had acquired the complete title would defeat him as against Albaugh. It would not avail him as against Albaugh to show that he had acquired the interests of only some of the heirs.

The foregoing general statement is perhaps sufficient to enable us to turn more to the details of the various stages of the proceedings complained of.

I. The regularity of the partition proceedings leading

up to the sale is conceded. Plaintiff's original petition alleged an oral contract entered into in August, 1908, for the purchase of the land, and asked specific performance thereof. It was also alleged that such contract was made with George T. Hedges & Co., and that Hedges & Co. were authorized to make such sale by Henry Weis, and that he was authorized by the heirs at law. The petition alleged a refusal to perform. It alleged that the contract price was \$10,500, and that a check of \$100 had been paid to Hedges & Co. The petition also tendered payment of the alleged purchase price. The later amendment which made John Albaugh defendant has been above set forth. On April 15, 1909, Albaugh was in default, and the plaintiff was entitled to have such default entered of record. Did such default enlarge the plaintiff's rights as against Albaugh? Was he entitled to take a decree as against Albaugh, regardless of his rights as against answering defendants? Albaugh was not a party to the contract sued on. Whatever rights the plaintiff had against him were only incidental to his rights against the principal defendants. If he was not entitled to specific performance as against the heirs at law, he was entitled to no relief against Albaugh. In such a case the default of Albaugh did not increase the plaintiff's right. The plaintiff not only took entry of default against Albaugh on that date, but he took a formal decree against him and against some of the defendant heirs at law. This decree was an adjudication for the time being that the plaintiff was entitled to enforce his alleged contract against some of the heirs. As indicated heretofore, this was not of itself sufficient to entitle the plaintiff to relief against Albaugh. To say the least, therefore, the entry of the decree against Albaugh in April, 1909, was clearly irregular and improper practice. Such decree, however, was later set aside upon motion of the defaulted defendant heirs at law as heretofore indicated. The con-

1. NEW TRIAL ON  
PETITION:  
fraud.

tention of the appellant is that the effect of such order setting aside the decree was to vacate the same *in toto*, even though Albaugh was not mentioned by name. Such decree found that plaintiff was entitled to a conveyance of the property upon the payment of \$10,400, and appointed the clerk of the district court a commissioner to make the conveyance. It also provided as follows: "It is further ordered, adjudged, and decreed that this decree is to be firm and effectual as against the defendant, John Albaugh, it being specifically found and so ordered, adjudged, and decreed that the said John Albaugh was duly and legally served with original notice in this action; that he acquired his interest subsequent to the rights of the plaintiff and with knowledge thereof; and that said original notice was served on him prior to the time he paid the purchase price for said land [and if said property has been conveyed to said John Albaugh, then, in that event, the defendant, John Albaugh, is hereby directed to convey said title to said real estate to the plaintiff, Frank Skvor]." The brackets are ours.

It is very clear that the setting aside of this decree as to the heirs at law left nothing operative against Albaugh, unless it be contained in the bracketed portion which we have indicated. The contention of appellee is that such part of the decree was a complete and independent adjudication against Albaugh, and that it was never set aside. We will consider that question later in another connection. After the setting aside of the decree and default, the heirs at law all answered denying the alleged contract sued on. Upon the issue so joined, the case was brought to trial as above indicated on January 13, 1910. The plaintiff introduced his evidence and rested. The transcript of such testimony was introduced in evidence by the appellee on the trial of this proceeding. We may as well say here that such testimony falls far short of proving the plaintiff's alleged contract. Upon the testimony so

introduced by the plaintiff he could not have justly prevailed in the suit. It was at this point that the alleged secret agreement was entered into between the plaintiff and Henry Weis, whereby the plaintiff was permitted to take the decree. It is undisputed that the agreement was made at this time as heretofore stated. Such agreement amounted to collusion as against Albaugh if his legal rights were affected by it. This last decree does not purport to award any relief in express terms as against Albaugh. The theory of the plaintiff is and was that he already had obtained a decree against Albaugh at the April, 1909, term, and that, if he could now obtain a decree against the heirs at law, the two decrees together would furnish him the complete relief for which he prayed. As we read these two decrees and undertake to construe them, we find it very difficult to determine whether they are effective to award to the plaintiff any relief as against Albaugh. For the purpose of this appeal, however, we will adopt the view of the appellee to the extent of assuming that the two decrees as they stand have the effect of a complete adjudication as against Albaugh. This effect must be found in the first instance, if at all, in the bracketed portion of the first decree which we have quoted above. There were no allegations in the petition or in the amendment which warranted this provision of such decree. If this proviso is fairly capable of the use and construction which the plaintiff contends for, its incorporation in the decree was a legal fraud upon the defaulted defendant. The case is ruled at this point by *Larson v. Williams*, 100 Iowa, 110. It may be that the fraud was neutralized and rendered noninjurious by the setting aside of the decree, but the appellee does not so contend. He contends for the continued existence of the decree as to Albaugh, and we will therefore consider the question from that point of view. The petition for new trial was filed within one year as provided by statute. It is argued, however, that ap-

pellant does not charge fraud at this point. The appellant's petition is not as specific in that respect as it might be. It does, however, recite all the facts which we have already stated, and charges fraud in their final culmination, and asks that both decrees be set aside on that ground. It is quite impossible to consider the effect of these two decrees separately without departing from appellee's own theory of his right. The record is confusing and complicated, but in its last analysis there was but one case and one adjudication. The beginning of the confusion was the irregularity of taking a decree against Albaugh before it could be known whether the plaintiff was entitled to a decree against him. Taking the two decrees together, and considering the circumstances and methods by which each was obtained, we think they amounted to such fraud as to entitle the petitioner to a new trial. Up to the moment of the collusive agreement between Weis and the plaintiff, the heirs at law were defending in good faith. Albaugh was subpoenaed as a witness and was present at the trial as such. He learned then for the first time that a decree had been taken against him. He must be presumed to have known that he was in default nor would he have any right to complain of any proper advantage which had been obtained by reason of such default.

Notwithstanding such default, he was entitled to equity as the court should ascertain it. Code, section 3793. Nor was the plaintiff entitled to any greater relief against him than against the answering defendants. *Curtis v. Smith*, 42 Iowa, 672.

On the other hand, it may be said that the heirs at law were not bound to defend on behalf of Albaugh. But that is not the question involved here. The heirs at law through their attorney promised to defend. They did interpose a defense in good faith. Under these circumstances, Albaugh suffered default. He wronged no one in so doing. If the heirs at law had been negligent and unsuccessful

ful in their defense, he would have borne the consequence. Up to the point of the collusive agreement between Weis and the plaintiff, the interests of the heirs at law were adverse to those of the plaintiff and in harmony with the rights of Albaugh. By such agreement these relations were changed. The net result was that the plaintiff obtained his decree, not because he had proved his alleged contract of August, 1908, but by virtue of the new contract entered into January 14, 1910. Albaugh's rights clearly antedated such new contract. When he suffered default, such new contract was not in existence. He never had an opportunity to defend against it.

II. It is urged by appellee that Albaugh was guilty of negligence in suffering default, and that such negligence was responsible for all the irregularity in the case. The

2. SAME: negligence of petitioner.

following excerpt from appellee's brief is illustrative of his contention at this point:

"It was Albaugh's duty to appear at the January term, 1909, to answer to the petition of the plaintiff. Albaugh did not do so. He might have appeared at the April term and answered at the April term, but he did not do so. He himself brought about unfavorable result of the litigation so far as the defendants are concerned. He permitted default and judgment to be entered against him by his own neglect, and his own negligence in not appearing and not answering, brought about the disastrous result which resulted to the other defendants, the Bear heirs, at the subsequent January term. "Can he now say that he is entitled to relief from either one of the decrees by reason of any pretended action taken on behalf of one or several of the Bear heirs to protect themselves against the unfortunate situation in which Albaugh, by his neglect, had placed them?" It is also urged that he has never excused such negligence. This argument misses the mark. Appellant is not complaining of any proper advantage resulting to appellee by reason of his default.

To suffer default is not of itself negligence. This is especially so where the relief prayed against a defaulting defendant is only incidental to, and dependent upon, plaintiff's rights as against another as principal defendant. A defendant in default is not an outlaw. He is still entitled to "equity" as it shall appear from the "pleadings and proofs." Code, section 3793. The plaintiff is still bound by the allegations of his petition. The taking of the decree against Albaugh in April, 1909, before obtaining a decree against the principal defendants, was not warranted by any allegation in plaintiff's petition. Appellee was responsible for this wrong, and it will not avail him to say that appellant ought to have been there to stop him.

III. On January 10, 1910, the plaintiff appellee filed an amendment to his petition. The substance of its allegations was that the defendant heirs at law had no further right to defend because their title had been  
3. SAME. acquired by Albaugh, and that plaintiff had obtained an adjudication against Albaugh by the decree of April, 1909. The contention presented by such amendment is now made before us. This contention serves to emphasize the wrong which was perpetrated either by the decree of April, 1909, or by the later decree of January, 1910. According to this contention, the default of Albaugh was fatal to all the defendants from the moment that the decree was entered against him. And this, even though some of them were then defending. It is true that some of the heirs at law were adjudged in default, and a decree entered against them. But the decree and the default were afterwards set aside, and they did then defend. Of what avail was it to set aside the decree as to such defendants if they were already barred by the entry of the decree against Albaugh? The decree entered in January, 1910, contained the following paragraph: "And the court having inspected the pleadings in said cause, consisting of the plaintiff's petition and the various amendments thereto

and the supplemental petition and all the various answers of the defendants on file and the plaintiff's reply, and having considered the evidence introduced by the plaintiff, documentary and oral, and considering the admissions and concessions made by counsel for the defendants orally at the trial, and considering the decree heretofore entered, and in view thereof, it is found, so ordered, adjudged and decreed." The foregoing is the only paragraph of the decree which indicates the ground upon which it was entered. It would appear therefrom that the very decree which was improperly entered against Albaugh in April, 1909, was treated as an adjudication against the principal defendants in January, 1910, and that the new agreement with the plaintiff for \$113 per acre took the form of "admissions and concessions" made "orally at the trial." That is to say, the January decree was a consent decree. It was based in part, at least, upon an amended petition filed after the default of Albaugh and without notice to him, and was based also upon a new contract which did not exist when such default was entered. In this manner plaintiff obtained a decree which he could not have obtained upon the merits of his original case as they appear upon this record.

On January 18, 1910, plaintiff's attorney wrote Albaugh a letter, which is a good summary of plaintiff appellee's contention, and we set it forth herewith:

Cedar Rapids, Iowa, Jan. 18, 1910. John Albaugh, Cedar Rapids, Iowa—My Dear Sir: Thinking perhaps you may not be advised of the results of the litigation in the case of Frank Skvor v. Bertha R. Weis et al., and as you are a party vitally interested in this matter, as your contract seems to be outstanding to pay \$113.00 per acre for this land when Frank Skvor's contract only calls for practically \$100.00 per acre, and you may be in for the balance, at least it appears so on the fact of the papers, I write you. Now, this decree that was just entered, settles the proposition that Frank Skvor is the owner of the land, and the decree not only directs you as the owner

of the legal title to convey to Frank Skvor, but also directs all the heirs of Christian Bear to convey to Frank Skvor within thirty days from this date. The time for you to convey is now up, as the decree was entered against you last April. Now, I advise you to see Mr. W. T. S. Bear, as I have been informed that you have been acting for him, to arrange this matter as speedily as possible. The whole matter ought to be adjusted in the course of the next few days, not only that Mr. Skvor, the owner of the land, may know what to do, but so that W. T. S. Bear may also know what to do, as the decree requires the settling the title within thirty days from today, and requires the giving of possession not later than the 1st day of March. You may consult your attorneys if you see fit, preliminary to adjusting this matter, but in my judgment there is nothing to do excepting to comply with the decree of the court, and the main reason for this is the fact that decree was entered against you by default last April, and the time for setting aside a decree entered on default has long since been past, and as you were the owner of the property according to the records of the district court of Iowa in and for Linn county, that decree against you was final and conclusive and was the main ground upon which I relied in obtaining the present decree against the Bear heirs. Of course, you will take the advice of your counsel, and in my judgment, and my advice on the subject will cost you nothing, is that you and your wife had better deed the property right over to Mr. Skvor, and my main reason for saying so is this, that had it not been for your default, it might have been possible for the Bear heirs to have defended successfully, but by reason of your being the owner of the property and decree having been rendered against you at the last April term of the court, and the time having passed in which to set aside the decree, the Bear heirs did not have much show, as they were no longer the owners of the property; but whatever you do, whether you take my advice or not, it will be for the benefit of all parties to act promptly. I could probably explain the matter to your attorney so as to enable him to give more prompt advice if you and he should desire to have a consultation with me about the matter. You will remember that I told you the other day that you may be in for at least thirteen hundred to fourteen

hundred dollars on this proposition, as the Bear heirs could undoubtedly collect from you at the rate of \$113.00 per acre, providing it was your fault that they lost this litigation, and you could only recover from Mr. Skvor \$10,500, as that was the price he was to pay for the land, and he could not be compelled to pay any more to you.

However difficult it may be to analyze the relative rights of the parties in this case, it is manifest from the foregoing letter that there was a grave miscarriage of justice accomplished in some way. The situation was even worse for Albaugh than is depicted in this letter. At the time of the purchase of the property by Albaugh at referee sale, he paid in \$3,280 of the purchase price. There is no provision in either decree for returning to him the amount paid, nor is there any provision which entitles him to receive any part of the purchase price from Skvor.

It is our conclusion that the two purported decrees are so related, both in their provisions and in the methods by which they were obtained, that they constitute in effect one adjudication, and that the petitioner is entitled to relief as against both of them, in that the method of their obtaining was a legal fraud upon him. And this is so regardless of whether actual fraud was intended by the successful parties. Upon that question we need not pass. Both decrees should be set aside and a new trial be granted. In view of the changed relation of the parties by reason of the agreement of January 14th, between plaintiff and Henry Weis, and of the amendment to petition filed after default, we think the petitioner should be permitted to defend the case on its original merits, and that his former default should be set aside for that purpose.

The order denying new trial must therefore be *reversed*.

SAMUEL B. MILLER v. CEDAR RAPIDS SASH & DOOR COMPANY, Appellants.

**Master and servant: MACHINERY GUARDS: SUFFICIENCY: STATUTE.**

- 1 The purpose of the statute requiring machinery to be guarded so as to protect the operators or those coming in contact therewith contemplates such means of protection as will reasonably accomplish the purpose, without unreasonably interfering with the efficiency of the machine. In this case it is held that the guard placed over a belt operating the machine and set in cleats in the floor, which could be easily toppled over from the side nearest the machine was not improper, unless from the customary use of the machine it was likely to be toppled over.

**Same: UNGUARDED MACHINERY: NEGLIGENCE: EVIDENCE.**

- 2 In this action the questions of whether the plaintiff operated the machine in the usual and customary manner, or in a way the master should have anticipated when guarding the same; and whether the guard might have been constructed so that it would not have toppled over when the machine was operated as the plaintiff did operate it, without unreasonably interfering with its usefulness, were for the jury; and the evidence is held to support a finding that the guard was improper.

**Same: CONTRIBUTORY NEGLIGENCE: PROXIMATE CAUSE.**

- 3 Even though plaintiff's negligence in operating the machine may have been the proximate cause of his injury, yet as it was concurrent with that of defendant in failing to properly guard the machine, that fact would not relieve defendant from liability for the injury.

**Same: CONTRIBUTORY NEGLIGENCE: EVIDENCE.**

- 4 In this action there was evidence that plaintiff did not know that the belt guard of the machine with which he was at work would turn and allow his foot, with which he operated the power lever, to slip into the belt, and he was not therefore negligent as a matter of law in thus operating the machine.

**Same: NEGLIGENCE: INSTRUCTIONS.**

- 5 Although the court told the jury generally in one instruction that for plaintiff to recover he must establish by the greater weight of the evidence that defendant was guilty of negligence which caused his injury, failure of the court in that paragraph to limit the negli-

gence to the grounds specified in the petition was not erroneous, where the same were clearly stated in defining the issues, thereafter separately and specifically submitted, and there was no evidence of negligence except as charged.

**Same.** An instruction that if the machine guard was of such character that defendant would not be negligent in providing the same, when in the exercise of reasonable care for the safety of his employees, he would not be liable for plaintiff's injury thereby, being of a negative character, was not prejudicial even if imposing on defendant too high a degree of care.

**Same:** ASSUMPTION OF RISK: INSTRUCTIONS. Failure of the court in its instructions on assumption of risk to refer to such risks as are incident to the employment was not erroneous, where the only risks alluded to in the evidence were those charged in the petition and shown to have been known to the defendant but not to the plaintiff.

*Appeal from Cedar Rapids Superior Court.*—HON. C. B. ROBBINS, Judge.

WEDNESDAY, JANUARY 17, 1912.

ACTION for damages resulted in judgment against defendant, from which it appeals.—*Affirmed.*

*Dawley & Wheeler*, for appellant.

*Barnes & Chamberlain*, for appellee.

LADD, J.—The plaintiff was engaged in operating one of defendant's machines, known as a "sander," when, as is alleged, his right foot was caught in a belt, drawn through an opening in the floor, and both bones fractured below the knee. The two grounds of negligence alleged are: (1) In failing to properly guard the rapidly running belt, so that plaintiff's foot could not come in contact therewith while he was engaged in operating the machine; and (2) in negligently and carelessly using and permitting to be used a belt upon the said machine with a hole in it.

Several errors are assigned, to intelligently understand which references must be made to the facts. The sander is somewhat difficult to describe. It was about four feet high, when the pressure top was down, and something like five feet wide. The pressure top could be raised about twelve or fourteen inches, and will take in forty-two inches of lumber in width, which was fed by the operator between the pressure top and the bed. This top was heavy, weighing about one thousand pounds, and could not be raised by hand. It was raised by power, which was applied by means of a small lever at the left end of the machine; the operator facing it. This lever worked sidewise and over a space of about two or two and one-half inches, and was about two feet from the floor. The power to run the sander came from the main shaft, and thence to the sander by means of belt connections over pulleys at the right end of the machine. It was used to smooth lumber by sandpapering it, pressing lumber against three revolving rollers; the first being covered with coarse, the second with medium, and the third with fine sandpaper. To raise the pressure top, the operator, facing the machine, pushed the pressure lever to his left, away from the machine, and to lower it he pulled this lever toward him a distance of about an inch and a half. The power lever was at the operator's right, and at the right end of the machine. Its lower end was fastened beneath the floor, and it passed through a slot in the floor and stood above it four and one-half or five feet. This lever is a strip of hard pine, one and one-eighth inches in thickness, and varying in width from four inches at the floor to two inches at its top, and its purpose was to put on or throw off the power from the sander; the power being applied by pushing the lever to the right, or from the machine, and throwing it off by pulling it toward the machine. The rollers referred to are connected with three different pulleys at the right end of the machine, and these are turned by belts, which pass from the pulleys through

the floor to the shafting. These pulleys, belts, and the holes in the floor through which they run are covered by a guard, which is "made from an eight or ten inch board that comes from the floor on a slant to above the pulley, then ranging back over another pulley, and then down to the floor." Boards were nailed on the outside from the machine, leaving spaces four or six inches wide, with nothing on the inside, toward the machine. Slats three-fourths or seven-eighths of an inch thick were nailed to the floor all around the hood or guard, so that it set in a pocket or groove, the depth of the slat. It was fastened in no other way. This description will be better understood by reference to the attached photograph, which shows the guard set out from the machine.

The plaintiff testified that the first belt conveying power was directly in front of the power lever, about two and one-half inches from it, and that the front board of the hood stood between these, and about an inch from the belt;

and, further, that: "On the afternoon of the 24th day of December, 1909, just before I was injured, I was putting a door through the machine, and the paper tore. When the paper tears, it gives an unusual noise—clip, clip, clip—very fast, and it is then customary to stop the machine as quickly as possible, because if the paper should tear and get fast under the drum it is liable to tear the felt or wires in the drum, and so cause a delay of five or six hours to fix it. On this occasion, I found the paper torn on the front drum. I threw the power off, and discovered that the paper on the front drum was torn. I released the pressure enough to take the door out. When I had the door out, I found that the paper wouldn't tear, and, in order to release the paper, I took hold of the pressure lever, and found that the power was out. The motion stopped, and I reached over with my foot to the power lever." After saying that, to "raise the drum and get the paper off, it will be necessary to put the machine in motion again," he proceeded: "I took my foot, with my hand on the pressure lever and my foot against the power lever, to raise the bed. Q. What occurred then? A. My foot slipped off the power lever against the hood, and threw the hood off, and my foot went in between them. Q. Was your foot caught in the belt, or not? A. The belt caught my foot and drew it onto the floor. My foot was in the slot in the floor, when I raised myself up by taking hold of the power lever and pulling myself up. Q. Where was the guard? A. The guard was right on its side. Q. Were you able to get up yourself? A. Yes, sir; I did. Q. How did you raise yourself? A. By taking hold of the power lever. Q. What did you discover when you pulled yourself up—did you raise the guard from the floor? A. Yes, sir. . . . The belt was at high velocity when my foot got tangled with the belt, which came off. I had to pull the belt out to get my foot out, and I found, after I pulled

the belt up, there was a hole in it. . . . Q. Was your foot in the neighborhood of the hole? A. Yes, sir."

The witness testified further that he had been directed by the superintendent to work rapidly, as they wished to get the work then on hand done that evening, as the shop would be closed for a week, though the superintendent denied having told him to hurry, but explained that he did say that the work should be done that evening, even if it were found necessary to work overtime. Plaintiff testified that his foot was on the lever, about eighteen inches from the floor, when it slipped, and that at that time his left hand was on the pressure lever, and his right hand on the table; that he might have stepped over and pushed the lever by hand, but that he had frequently done so with his foot prior to that time; that if the guard had not fallen, his foot would not have gotten into the belt; that his face was toward the power lever when his foot slipped, and instantly, upon striking the edge of the guard, it was caught by the belt; that the hole in the belt was about two and a half inches one way by one-half inch the other. "Q. You do not know whether your foot got caught in that hole, or not? A. Certainly, I do. Q. Do you mean that your foot got caught in a hole about two and one-half inches long and a half-inch wide? A. Yes, sir. Q. How do you know that your foot got caught in the hole? A. Because it was there, and the belt had the edge of my sole in the edge of the hole."

Whether it would have been practicable, without interfering with the operation and efficiency of the machine, to have attached the guard with a small latch to the floor, or by bracing it to the cupboard in the rear, or by drilling a small hole into the casting forming the side of the sander, and inserting the screw eye therein, and connecting the hook to the top of the guard, was in dispute, as was also the distance from the pressure lever to the power lever,

plaintiff estimating this at sixty-six inches and defendant's witnesses testified it was seventy-eight inches.

There was also a conflict in the evidence as to whether employees, in operating the sander, frequently, when lifting the pressure top with the left hand applied to the small lever, turned on the power by pressing the foot against the power lever, the plaintiff saying that this was done nearly every day, and had been done by him in the presence of a superintendent not then in the factory, and he was somewhat corroborated by another, who had operated the machine; while the testimony of the superintendent was to the effect that this was improper and dangerous practice; that it had never been observed by him; and that it was impossible for a person of plaintiff's height, because of the distance between the two levers, to perform the work in this way, and this testimony was somewhat corroborated by other witnesses. The sandpaper on the drums ordinarily lasted about nine hours, and in changing this it seems to have been necessary, not only to stop the machine, but to remove the guard. So that the guard was removed nearly every day, and sometimes several times the same day.

I. The defendant's first contention is that the evidence was not sufficient to sustain a finding that the belt was not properly guarded. It was guarded, so that the in-

1. MASTER AND  
SERVANT: ma-  
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guards:  
sufficiency:  
statute.

quiry was necessarily limited to ascertaining whether this was properly done. The design of the statute is that something shall be placed near to or over the machine or parts thereof specified in such a manner, and of such material, as to protect employees coming in proximity with or using it from being injured by coming in contact therewith. As said in *Kirchoff v. Creamery Supply Co.*, 148 Iowa, 508: "What such guard shall be is not specified, save in exacting that it shall be proper. According to the lexicographers, 'proper' means 'fit, suitable, appropriate;' and to be guarded 'properly' is to be so covered as to reasonably accomplish

the design of guarding. A planer or other instrumentality mentioned in the statute is properly guarded when the device attached is of material and construction, such as will shield those operating it, or moving near it, from contact therewith, when in motion, at least when practicable, without unreasonably interfering with the efficiency of the machine. If not reasonably suitable and calculated for this purpose, the cover is not proper, and the proprietor, in omitting to obey the mandate of the statute, is guilty of negligence." The guard, according to the evidence, was set inside of the cleats nailed to the floor. As to those approaching from the side opposite the machine, it probably was sufficient, but, not being otherwise fastened, it could be easily toppled over by pressure from toward the machine. In that direction it would seem that little protection was afforded by it. Was this required? Certainly not, in so far as this case is concerned, unless the plaintiff, in moving the power lever with his foot, operated it in the usual or customary way, or as the defendant might reasonably have anticipated its employees would operate it.

The plaintiff testified that this was the usual way, and that he had pushed the lever over with his foot nearly every day, and sometimes oftener, during the two months

2. SAME: un-  
guarded ma-  
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ligence: evi-  
dence.

he had operated the machine, and once, at least, in the presence of a superintendent, and this was corroborated by another witness, who testified that he had done the same, especially when in a hurry. On the other hand, the practice was declared by the superintendent, who denied all knowledge of it, to be dangerous and improper, and there was evidence tending to show it to have been impossible for one of plaintiff's height. It is clear from this recital that the issue was for the jury, and that it might have found, either that moving the lever with the foot, in the contingency in which plaintiff acted when injured, was the

usual method, or such as defendant reasonably should have anticipated in guarding the machine.

If, then, the power lever might properly be moved with the foot, was it enough to set the guard over the belts and pulleys without fastening it, otherwise than by the cleats, in some way? The evidence in behalf of plaintiff indicated that the guard might have been held in place by a latch attached to the floor, or by a brace back of it, or by a hook attached to the frame of the sander, without interfering with the belting, or much inconveniencing the handling of the guard; while that on the part of defendant tended to show that these could not have been used, because of the location of the belts, or were impracticable, because of interfering with the use of the guard, which had to be removed several times a day—every time a sandpaper on a roll tore, or was worn out. Doubtless any of the fastenings, such as mentioned, would have interfered somewhat with the performance of the work, for the guard must be unfastened before being removed; but this was a circumstance to be taken into account in connection with the probable danger to the employee in operating the lever without having the guard fastened. If the situation was such that, notwithstanding its interference with the rapid removal of the guard, an ordinarily prudent person would have deemed the fastening essential to the protection of employees in the operation of the machine, then this was required to constitute a proper guard, and defendant was negligent in not providing such fastenings as would have held the guard in place. Of course, the converse follows, and the evidence was such as to carry this issue, also, to the jury.

We conclude, then, that there was sufficient evidence to sustain the finding that defendant was negligent, in that its belt on the sander was not "properly guarded."

II. It is said, however, that, even though defendant might have been negligent in not providing a proper guard,

neither this nor the hole in the belt was the proximate cause of the injury. Had the guard been fastened, the plaintiff's foot could not have reached the belt. Being unfastened, the guard fell over and let the foot in the belt, which injured it. The direct sequence of the defect in the guard was the injury to the foot by the belt. Of course, if the foot had not slipped, the guard would not have fallen off. Nor would this have happened, had plaintiff moved the lever by hand, instead of attempting to do so with his foot. The slipping of the foot, like the attempt to move the lever with it, however, was the bringing of that portion of the plaintiff's body within the danger zone of defendant's negligence, and could not have intervened between its continuing negligence in operating the belt without a proper guard and the plaintiff's hurt when brought in contact therewith. In other words, the slipping of the foot and consequent pushing of the guard, even though the proximate cause, did not intervene between the negligent operation of the belt and the injury, but, at most, was concurrent therewith, and this would not obviate defendant's liability. *Bales v. McConnell*, 27 Okl. 407, (112 Pac. 978); *Buehner v. Creamery Package Co.*, 124 Iowa, 445; *Walrod v. Webster Co.*, 110 Iowa, 349.

III. Nor can it be said that, in undertaking to move the lever with his foot, if this was not an improper manner of doing so, plaintiff was guilty of contributory negligence.

Of course, he knew how the guard was constructed, and where the pulleys and belts at the right end of the machine were, but he had the right to assume that these were properly guarded, without making an investigation. He was asked if he knew that guard "could be pushed off altogether from your side? A. I know now. Q. You knew before your injury that if your foot should slip off that lever and hit the inside of the hood, or the edge of the hood, that you were

3. SAME: contributory negligence: proximate cause.

4. SAME: contributory negligence: evidence.

liable to push it off? A. No; I did not know that. I did not know that. Q. What was there to hold it on? A. There was nothing there. It proved to be nothing there. Q. You knew there was nothing there before you were hurt? A. I did; but I did not know it would go off. Q. You knew there was nothing to prevent its falling off? A. I never saw it go off before. It had never gone off before that I know of." The jury might have found that he was performing the work in the usual manner, and that he had been directed to hurry. In these circumstances, it ought not to be held, as a matter of law, in pushing the lever with his foot he was negligent. *Pierson v. Railway*, 127 Iowa, 13; *Buehner v. Creamery Package Co.*, 124 Iowa, 450.

IV. Several of the instructions are criticised. In the second, the jury was told generally that, in order to recover, plaintiff must prove, by the greater weight of evidence, that defendant was guilty of negligence which caused his injuries, and in the third such general finding is referred to, and it is argued that in each there was error in not limiting such negligence to the grounds specified in the petition. It is enough to say (1) that the grounds of negligence had been clearly stated in defining the issues, (2) were subsequently separately and specifically submitted in the fourth and fifth paragraphs of the charge, and (3) no evidence was adduced tending to prove any neglect, other than charged. Moreover, in the seventh paragraph, the jury was informed that the burden of proof was on plaintiff to establish the injury by negligence of defendant in the manner "claimed by him," thereby limiting the same to the grounds alleged. We think the reference to negligence sufficiently specific to avoid possibility of the jury going beyond the issues.

Exception is taken to that portion of the fourth instruction, directing the jurors, if they found that "the

5. SAME: negligence; instructions.

guard on the machine in question was such a guard as would be deemed ample and sufficient, for

6. SAME.

protection of those engaged in operating said machine, by a man in the exercise of ordinary care for the safety and protection of his employees," the defendant was not negligent. Even if this did indicate too high a degree of care, though we think it did not, it, being negative, could not have prejudiced defendant.

The sixth and seventh instructions are criticised, in that, in submitting the issue as to assumption of risk, "such risks as are incident to the employment" were not

alluded to. Had other risks than those of the alleged defective guard and the hole in the belt been touched in the evidence, this

7. SAME: assumption of risk: instructions.

criticism would have had merit. But the record was such that none other could have been considered by the jury. Though defendant's superintendent had known of the hole in the belt several years, the testimony of plaintiff, that he had not observed it prior to his injury, was uncontradicted. He could not then have appreciated the danger, and therefore could not have assumed the risk. The defendant had constructed the guard, and, of course, was aware of its condition, and under chapter 219 of the Acts of the 33d General Assembly was not in a situation to set up the defense that plaintiff had assumed the risk, either as to it, or to the hole in the belt, unless it was his duty to repair or remedy the defects alleged, and this issue was submitted to the jury. The instructions, in view of there being no evidence concerning risks incidental to the employment and not solely due to defendant's negligence, were in accordance with the cited statute, which provides: "That in all cases where the property, works, machinery, or appliances of an employer are defective or out of repair, and where it is the duty of the employer from the character of the place, work, machinery, or appliances to furnish reasonably safe machinery, appliances or place to work, the

employee shall not be deemed to have assumed the risk, by continuing in the prosecution of the work, growing out of any defect as aforesaid, of which the employee may have had knowledge when the employer had knowledge of such defect, except when in the usual and ordinary course of his employment it is the duty of such employee to make the repairs, or remedy the defects. Nor shall the employee under such conditions be deemed to have waived the negligence, if any, unless the danger be imminent and to such extent that a reasonably prudent person would not have continued in the prosecution of the work; but this statute shall not be construed so as to include such risks as are incident to employment. And no contract which restricts liability hereunder shall be legal or binding."

We discover no error, and the judgment is *affirmed*.

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T. R. FENTON, Appellee, v. H. C. MILLER, Appellant.

**Brokers: SALE OF LAND ON COMMISSION: COMPENSATION: EVIDENCE.**

- 1 A broker authorized to find a purchaser for land need only show that he was the efficient and procuring cause of the sale, and that it was through his efforts that the sale was finally consummated; and even though the land may have been listed with another agent who first endeavored to sell it to the same purchaser he is not required to show an abandonment of the negotiations by that agent.

**Same: EFFICIENT AND PROCURING CAUSE: EVIDENCE.** Ordinarily the

- 2 question of whether a broker's efforts were the efficient and procuring cause of a sale, or which of two or more brokers with whom the land was listed in fact induced the sale, is for the jury. In this case the evidence is held sufficient to support a verdict for plaintiff, although another agent had the land listed and had first seen the purchaser about buying it.

**Same: COMPENSATION: CONFLICTING CLAIMS.** Where land is listed

- 3 for sale with different agents and each is claiming the compensation, the owner, to protect himself, should pay neither until the right thereto has been judicially determined, otherwise he may have to pay both.

Weaver and Evans, JJ., dissenting.

*Appeal from Cherokee District Court.*—HON. JOHN F. OLIVER, Judge.

THURSDAY, JANUARY 18, 1912.

ACTION to recover a commission for the sale of real estate. Defendant denied that plaintiff was the procuring cause of the sale. On these issues the case was tried to a jury, resulting in a verdict and judgment for plaintiff, and defendant appeals.—*Affirmed.*

*B. Radcliffe and Herrick & Herrick*, for appellant.

*Molyneux & Maher*, for appellee.

DEEMER, J.—Plaintiff claims that on or about the 15th day of September, 1908, he and the defendant herein entered into an oral agreement, whereby the plaintiff was to exercise his skill in procuring for the defendant a purchaser of his farm, and if the farm was sold as a result of the plaintiff's efforts in procuring, sending to, or bringing to the defendant a purchaser for his farm, then the plaintiff, T. R. Fenton, was to have and receive from the defendant as his compensation, the sum of \$1 an acre for each acre so sold. Immediately, plaintiff put forth every effort in seeking a purchaser, and after a diligent search his efforts were finally rewarded and the farm sold to one D. M. Lorenzen.

The testimony shows that defendant listed his farm with the plaintiff for sale, but at the time refused to give him an exclusive agency, notifying him that he had already listed the land with another agent named Barnes. One Lorenzen was also the owner of a farm in Cherokee county, which he had listed with the plaintiff for sale; but this listing was conditioned upon Lorenzen's being able to purchase another farm. At the time the defendant listed

his land with plaintiff, he (plaintiff) said to defendant: "I will keep the numbers of your land here and your price as you gave it to me and keep it on my list, but I won't do as much work on your farm as I would if I had an exclusive contract, and if at any time I run across a purchaser for your farm and it is not sold, I will go down and see you and see if we can make a deal. Miller said this would be all right, and that he would allow \$1 per acre in case Fenton would bring or furnish him a buyer on any terms and price satisfactory to Miller."

In order to induce Lorenzen to sell, plaintiff tried to interest him in other lands, and, after showing him a tract, Lorenzen spoke about defendant's farm, saying that he had seen it advertised for sale in a newspaper by Barnes; that he had spoken to Barnes about it and had been down to see it, but that Miller, the defendant, was not at home; that later he went over the farm with defendant and then saw Barnes and had a talk with him about the matter before anything was said by him to plaintiff or by plaintiff to him about the property. Later Lorenzen again saw plaintiff and urged him to sell his farm, as he wanted more land, but at all times asserted that he would not sell unless he was assured of another farm. Plaintiff then sent his brother with Lorenzen to look at defendant's farm, but defendant was not at home, and later plaintiff and Lorenzen went to see defendant, took dinner with him, and talked over the sale. Some talk was had about the price, and defendant said he would not take less than \$100 per acre. No conclusion was reached on that day, but defendant said he would come up next day and try to close the deal; that if Lorenzen would take his land at the price fixed, terms could be agreed upon. On this next day plaintiff sold the Lorenzen farm, but before closing, he telephoned defendant and asked if he would come up as agreed and close the deal with Lorenzen, to which defendant responded that he would. On the next day, which was February 6,

1909, defendant and Lorenzen both came to town; Lorenzen and wife going to a lawyer's office to wait for defendant in order to close the deal. Plaintiff had seen defendant in a bank, and he phoned him about the matter; but he (defendant) said he did not know that he had anything to do with it; that Barnes had sold the land. Plaintiff then went to the bank, where the following conversation was had:

Miller said, 'Fenton, I didn't know you had the sale of this farm,' to which plaintiff responded: 'Is that so, Mr. Miller? How did that happen?' Miller said: 'Why I don't know. I understood Barnes sold it. You have nothing to do with this deal. This man is Barnes' man. Barnes informs me he has made this deal.' Plaintiff then said: 'Is that so? Let's get Mr. Barnes in.' It took a little time to get Barnes in, and before he got in Miller says, 'I knew, Fenton, you did the work, but I understood you were working for Barnes.' Plaintiff responded: 'Well, Mr. Miller, the day you came into my office I told you I didn't work with anybody, and if you thought I was working with anybody else but myself down there, and when I called you up over the phone, why didn't you say so? 'Oh', he says, 'I didn't know; but now I understand Barnes claims he has made this sale, and I am not going to pay two commissions.' Plaintiff then said: 'I don't blame you for that.' And I think then Barnes came in, and he claimed to have made the sale, and, of course, Mr. Miller refused to acknowledge me as the man that was making the sale there.

We now quote from the record the following:

Mr. Lorenzen came down, and we talked a little while about the price, as we had not decided on the price, exactly, and I said: 'Well, how about the price, Miller? What do you have to have for that farm?' And he says, '\$100 per acre,' and I was looking at Lorenzen, and I says, 'I guess you have got to pay the \$100 per acre,' and Mr. Lorenzen walked over to Mr. Miller, and they stepped outside and talked a little, and then Mr. Barnes drew the contract of sale, and I was there, and they wanted to get earnest money, and they didn't have anything, and I said I would go and get the money I had received for the note. It was

a \$2,000 note, and I turned that over to Mr. Lorenzen, and they agreed to accept that as a payment on the Miller farm. After the deal was closed up, I saw Mr. Miller, and asked him, and he refused to pay, and said he refused to pay me anything.

Plaintiff further testified as follows regarding the first talk he had with Lorenzen about the defendant's farm:

I got into conversation with Mr. Lorenzen about this place the day we were looking at the Jeffery farm, south of Cleghorn. Lorenzen would buy the Jeffery farm if I could sell his (Lorenzen's) farm before the Jeffery farm was sold. Coming home from the Jeffery farm, one of us mentioned the Miller farm, and he told me Barnes had talked with him about it, and he had been past the place. I think he said he saw Barnes had it advertised, and I told him he had, and we talked about it being advertised by Barnes, and I think he said he had been in the bank and spoken to Barnes, or Barnes spoke to him, I don't know which, and he told me he had been by the place, but I don't remember if he told me he and his wife had been down and looked at the place. My brother was working for me, and I sent him down with Mr. Lorenzen to give him a chance to thoroughly look over the place with the intention of buying it. Q. You knew at the time Mr. Lorenzen had looked over the farm, did you not? A. From what he said to me he hadn't looked over the farm. That makes me think that he did say before that his wife had been with him, and they stopped and looked at the house, I believe. That makes me think, his wife was down with him one time, before we were out to the Jeffery farm. I brought Mr. Lorenzen to Mr. Miller as a buyer for that farm. February 4, 1908, and we talked about it all afternoon and until we left for home towards evening. At that time I had not closed the sale of Lorenzen's farm, and he would not sell unless he could find another farm to buy. That was not the reason, in particular, that I went down to see Miller that day. I wanted to sell Lorenzen's farm, and I wanted to go down and look at it as quick as I could get him to make a deal. In trying to sell Miller's place I was working for Miller.

Another witness testified that he heard the conversation between plaintiff and defendant the day before the defendant's farm was sold, when plaintiff called defendant up and asked if he would stand by the agreement to sell his farm, and that he heard defendant say to plaintiff that he would be up the next day. This is the substance of plaintiff's case as made by the testimony.

Defendant testified that he attempted to list his property with plaintiff, but was unable to do so because plaintiff insisted upon an exclusive agency; that he had already listed the farm with Barnes, and so informed the plaintiff; that upon plaintiff's refusal to accept the proposed agency he had no further talk with plaintiff until he and Lorenzen came to his place, stopped for dinner, and talked in a general way about the farm and the price for the same. He further testified that Barnes sold the farm and that he paid him a commission for making the sale. He further testified that he talked with Lorenzen about the sale before plaintiff brought him down; that he agreed with him (Lorenzen) to meet and arrange about the sale; that the next time he saw Lorenzen plaintiff came with him; that they did not look over the farm, but had considerable conversation regarding terms and price. He admitted having a telephone communication with plaintiff, but denied that he did more than promise to meet plaintiff and Lorenzen the next day. We now quote from the record this further testimony given by defendant:

Q. Don't you know that Mr. Fenton told you over the phone that Mr. Lorenzen would not accept any payment on the purchase price of his farm until he knew that he could buy this? A. No, sir; I understood this condition all the time. I didn't hear that over the phone. I went to town the next day and was asked to come up to Fenton's or Radcliffe's office, I am not sure which. I was doing some banking business with Mr. Barnes at the time, in his bank, and met Fenton there in the lobby of the bank. Q. And the terms and price were talked about at this time,

were they not? A. I think so, most everything was.

Q. And you and Lorenzen finally settled? A. Not there.

Q. Now, who was it, in fact, that made that payment for Lorenzen—who brought the money or the equivalent of it?

A. I don't know anything about it. Q. Why, you got a note, didn't you, signed by Charlie Quirin? A. I didn't.

Q. What did you get as earnest money consideration?

A. I got credit in Barnes' bank. I do not know how it was obtained. Q. You knew Mr. Fenton had an agency in that matter, didn't you? A. I remember of him coming there.

Q. And Fenton was there part of the time during the closing up of this? A. No, sir; he was not. Q. You went back into the private room to make the contract?

A. Yes, sir. Q. Well, wasn't Fenton there all the time until this contract was signed? A. Well, I think not.

. . . Q. What did you understand Fenton was there for? A. Well, that is a pretty hard matter to determine.

Now, I will tell you the first thing that entered into my mind was possibly Mr. Barnes had employed him to come down with Lorenzen, and then another thing was that he knew Lorenzen wanted to find and buy this farm, and wanted to sell his farm, and in order to sell his farm he wanted to find out whether he could purchase my farm or not. A day or two after that I asked Barnes if he had sent him down there. That was after the deal was made and before I paid the commission. Fenton was there, and he made no objection or suggestions. Q. Did you make any inquiries why he was there and what he had in it? A. Yes, sir; I asked Fenton there in the bank what he had to do with it, and he said this farm of mine could not be sold without his selling it, without his doing the business. I says: 'If you own this man, that is a different question; that is a different proposition.' That is about all that was said. It was before the contract was made, when we were all through talking about the contract. . . . Barnes was never out with Lorenzen, and I am not certain that Lorenzen and Barnes and I were ever together with reference to this land until the day we met in the bank. Fenton had brought the man out and spent half a day with him. He came in time for dinner, and he called me up over the phone and wanted to know if I was coming to town the next day. Q. And the first time that you and Lorenzen

and Barnes ever got together was the day that Mr. Lorenzen bought the farm, after Fenton had brought him out there? A. I think so.

Lorenzen, the purchaser, testified in substance, as follows:

I lived four miles south of Marcus, and the Miller farm was nine miles south of my place. I got my first information that the farm was for sale by seeing it advertised in the paper by Mr. Barnes. After seeing the advertisement, I went into the bank at Marcus and saw Mr. Barnes about it. I asked him where the farm was he had for sale, and he told me, and I said if it was not any further than that I would drive down some day and see it. I drove out and around the farm and looked at it. I didn't find any one at home that day. Then my wife and I went down about a week after that and found Mrs. Miller at home. We drove all over the farm and examined the house, barns, cribs, and everything. Then I saw Mr. Barnes again and told him we had been out there and looked at the farm, and I said the price was a little steep. He said it was a good farm and could not be beat for the improvements and fences, and I told him I knew that it was that way. I went down again alone, and Mr. Miller was at home that day, so I and him we went over the field, but we didn't take no time. The Court: Was that before Fenton had talked to you about it? A. That was before Fenton had anything to do with it. I talked about the price and asked him if that was the lowest, \$100, and he said, 'Yes.' After that I was up to Fenton's office one day, and we got to talking about the Miller place, and he said he wouldn't doubt but after a while he would have it, and kind of wanted me to wait until that time. He did not claim to have the place for sale then. He said that if I would wait a while we would drive out and look at it, and, of course, I waited, and pretty soon, it wasn't long, until his brother came and took me out. He claimed he had it for sale. I think that was a little after the 1st of January, but I am not sure about that. When Billy Fenton took me out, there wasn't any one at home, and about a week later Tom Fenton, the plaintiff, took me out. He said he thought he could get it a little cheaper. He thought he could get it

down to about \$90; but that didn't work. We saw Mr. Miller, but I didn't buy the farm that day. We talked about the terms, and I don't think we did any more business with Mr. Fenton in regard to that farm. I bought the farm the day Miller came to Marcus. We made the deal at Mr. Barnes' bank. Mr. Barnes was doing the business. Mr. Fenton was there in the bank all the time, but not in the same room. Mr. Miller brought me there to the bank. I had no agreement with Mr. Fenton to go in there to the bank. It was Mr. Barnes who introduced me to this farm and brought about the sale. I heard Mr. Fenton's testimony in regard to bringing \$2,000 for me from his office to pay down on this place. That was my property. . . .

Q. Now, was there anything said between Mr. Fenton and you about the commission? A. Yes, sir; there was.

Q. And what was said? A. Why, Mr. Fenton says, 'I will give you \$100 if you will help me out on this deal.'

Q. On what deal? A. On that commission, and I said I wouldn't do it. . . . I did not make up my mind to buy the Miller farm when I saw the ad in the paper, nor when I went into the bank to see Mr. Barnes about it. I did not make up my mind to buy it the day I went out alone to see it, nor when I saw Mr. Barnes in regard to the price, nor when I went with Will Fenton to see it. I went out with Tom Fenton in a livery, and we looked at the place and talked about the price and the terms, but I didn't make up my mind that day. The next day I closed up the deal with Mr. Quirin. I am not sure that I asked Mr. Fenton to phone Miller, but I heard him phone. He says, 'Will you be up there tomorrow morning?' And the way Mr. Fenton answered he told him he would, but he didn't come. That was a stormy day. When Fenton told me Miller was coming in, I signed the contract for the sale of my farm to Mr. Quirin. I didn't sign the contract with Quirin just because Tom told me Miller was coming next day, but that was part of it. I came to town next day on purpose to meet Miller, and we closed the deal for his farm. Q. Who sold the farm? A. Why, Mr. Barnes sold the farm; he made the contract. Q. He made the contract and sold you the farm? A. I bought it of Mr. Barnes. I made up my mind to buy the Miller farm the day he came up. After Tom had telephoned, I signed the

Quirin contract for my farm because I wanted to sell, and then I made up my mind to buy the Miller farm. Q. Didn't you tell me that day that you wanted to come here to testify before Miller that Fenton had sold you that farm? A. Well, I might have told you that.

Barnes was also a witness, and the substance of his testimony is as follows:

I was employed by Mr. Miller, November 3, 1908, to sell his farm. Q. What were the terms as given to you, as to the price? A. The price was \$100 per acre. Q. What did you do, Mr. Barnes, with relation to making the sale of the farm? A. I immediately put an ad in the Marcus News that I had the farm for sale. In about two weeks Mr. Lorenzen came in and saw me about it and asked about the terms, and I told him about it, and he said he would go and see the farm. I told him I could not very well go out, but for him to go and look the farm over with Mr. Miller, and if the farm suited him we would try and make a deal. He said he had to sell his farm, and if he could sell it he would look this farm over and come again. He came back in a few days and said he had been out, but was going again, and would take his wife with him. After he had done that, he came in, said they had been to see the farm, and looked it all over, and had looked at the buildings, but he hadn't yet made up his mind whether he would have it. We talked the matter over and talked about the advantages of the farm and how it was fenced and about the buildings and improvements, and I endeavored to sell him the place. I saw him several times after that. Whenever he came into the bank we talked it over. I think three or four times during the winter. I told Mr. Miller what I had done, and that later, if he sold his farm, I would be able to make the deal at \$100 per acre. I knew Lorenzen had to sell before he could buy. I could not say whether we talked again after that before the consummation of the deal on the 6th day of February, 1908. At that time I was in the bank, and Mr. Miller came in, and, after waiting a while, Mr. Lorenzen came in, and the three of us talked it over. Later, Mr. Fenton came in, and it was after he came in that the contract for the sale of the farm was made. Before Mr. Fenton came in, we had agreed up-

on the sale of the farm at \$100 per acre, and we talked over how the payments should be made. Mr. Lorenzen had to make some arrangements about a part of the money. I don't know what motive prompted Fenton to be there. I don't know as any of us sent for him. After Mr. Lorenzen, Mr. Miller, and myself had agreed on the price and the terms, I proceeded to draw up a contract. At the time I drew the contract, Mr. Fenton was in the back office, and I drew the contract in the front banking room, at the counter, and Lorenzen and Miller stood by me. After it was drawn, Mr. Miller, Mr. Lorenzen, and Mrs. Lorenzen signed it there. I think Fenton was in the back office when the contract was signed. Mr. Fenton told Mr. Miller that he claimed a commission for selling the farm, and Mr. Miller said he didn't sell the farm, and he didn't owe him any commission, and that he hadn't the agency of selling the farm. After the contract was made, I received a commission from Mr. Miller for selling the farm. . . . I did not take Lorenzen to see the place. I knew when we made the contract that Fenton had had him out once. I did not know Lorenzen had refused to sell his farm until he was sure he could buy Miller's, and I didn't know that he had closed the deal for the sale of his own farm to Quirin the day before. I found it out that day when I bought the \$2,000 note Quirin had paid to Lorenzen on his farm. I learned that before any commission was paid to me. Q. Now, Mr. Fenton was there assisting in the talking about negotiations in the bank there? A. Yes, sir. Q. Did you have anything to say about closing the deal or the price, or did Lorenzen and Miller settle that themselves? A. I had something to say about it. Q. And so did Fenton? A. No, sir; he did not. Q. You weren't in the office? A. He may have, not in my presence. I knew Fenton had him out there the day before or a few days before. I don't know when he had him out. At that time I didn't know he had ever been out with him. I heard it was his brother. I don't remember that Miller ever phoned to me that they had been out, and I do not remember having any talk with Lorenzen about it after they had been out there. I could not say when I first learned that Fenton had Lorenzen out to that farm. I first learned that Lorenzen had made up his mind to take the farm the day we closed the

deal. I don't remember that he had ever agreed to take the farm or told me that he had prior to that time.

Upon this testimony the case was submitted to the jury, with the following relevant instructions:

(4) You are instructed, as a matter of law, that in cases of this character, to entitle a real estate broker to recover a commission for procuring a purchaser for the lands of another, there must be a contract of employment between himself and the owner, whereby the owner employs and promises and agrees to pay the broker a commission for such services. And it must also be shown that it was through the efforts and inducements exerted by the broker that the purchaser and the owner were brought together, and induced to enter into and continue the negotiations which finally culminated in the purchase.

And where the owner has listed the land under such a contract with two real estate brokers, both of whom work upon and use their efforts to secure the customer who makes the purchase, that one only will be entitled to the commission whose efforts and persuasions were the main and moving cause of inducing the customer to meet with the owner and take up the negotiations which finally culminated in the sale. And where the owner and purchaser have already been brought together and are in the course of negotiations through the efforts of one broker, and thereafter the other broker takes up the matter, and attempts to procure the purchaser as a customer for himself, the latter will not be entitled to a commission for his services, unless it appears that the negotiations induced through the efforts of the first broker have been broken off or abandoned, so that the efforts of the first are not the principal and moving cause by which the purchaser was induced to again take up or renew the negotiations and complete the purchase, and that the efforts and persuasion of the latter were the principal and moving cause of bringing the parties together again, and taking up the negotiations which finally resulted in the sale.

(5) If you should find from the preponderance of the evidence that on or about the 15th day of September, 1908, the defendant listed the tract of land in question with the plaintiff, and then and there orally promised and agreed

to pay the plaintiff a commission of \$1 per acre, in case he should succeed in finding and procuring a person to purchase the same at a price and upon terms satisfactory to the defendant, or that in substance, and you further find from a preponderance of the evidence that thereafter the plaintiff, in pursuance of said contract of employment, found and procured one Lorenzen as a purchaser for said land, and that the efforts and persuasion of the plaintiff were the main and moving cause which brought the parties together and induced the said Lorenzen to enter into negotiations and make said purchase, then the plaintiff will be entitled to recover in this action, and your verdict will be in his favor.

If you do not so find, or if you believe from the evidence that there was no contract of employment between the parties whereby the defendant listed his land with the plaintiff and promised and agreed to pay him a commission of \$1 per acre in case he should succeed in finding and procuring a customer, or that in substance, or if the efforts of the plaintiff, if any expended by him upon the said Lorenzen, were not the main and moving cause which brought the parties together, and induced the said Lorenzen to enter into or continue the negotiations and complete the purchase, as hereinbefore stated and explained, then the plaintiff can not recover anything in this action, and your verdict will be for the defendant.

In view of the contentions made for appellant, it has seemed necessary to quote from the record even at the expense of brevity; for the principal point made is that there should have been a verdict for the defendant under the testimony adduced.

The only instruction which is challenged is the fourth, being the one first quoted, and the argument against it is that there was no such testimony of Barnes' abandonment of the negotiations with Lorenzen, and of plaintiff's thereafter taking the matter up, as to justify its injection into the case. The record is not such as to lead us to this view.

True, there was no direct testimony of any abandonment

1. BROKERS: sale  
of land on  
commission:  
compensation:  
evidence.

by Barnes of the negotiations begun by him; but a jury was justified in inferring that Lorenzen ceased his negotiations with Barnes and took the matter up with plaintiff Fenton. Plaintiff was not bound to show that Barnes consented to an abandonment of his negotiations with the purchaser. All that he needed to do in this connection was to show that he was the efficient, the procuring, cause of the sale, and that it was through his efforts that the sale was finally consummated. No formal showing of an abandonment was necessary. It could be inferred from the conduct of the parties, and there was, as we think, enough in the testimony to take that question to the jury. The instruction is not erroneous.

The close question in the case is this: Was there enough testimony in the record to take the case to the jury upon the issue as to plaintiff's efforts being the efficient and procuring cause of the sale? It is true the purchaser testified that he recognized Barnes as the agent and purchased through him; but this testimony is not conclusive. All the evidence offered should be considered in settling this issue, and if the direct testimony be conflicting, or if the inferences to be drawn therefrom be such that reasonable minds might honestly differ in their conclusions as to whose efforts really brought about the sale, the question was for the jury, under proper instructions. Recurring again to the testimony, it will be observed that, notwithstanding defendant's denial, a jury may well have found that he listed his land with both plaintiff and Barnes; that each of the agents spoke to Lorenzen about the land, although Barnes was the first one to mention it to him; that each induced him to go and look over the land, although plaintiff is the only agent who went with him; that each knew the other was trying to sell the land to Lorenzen; and that each talked over the price and urged him to buy. It is apparent, also, that plaintiff had an advantage over Barnes, in that Lorenzen

2. SAME: efficient and procuring cause: evidence.

was in no position to buy, and distinctly stated that he would not unless plaintiff sold his (Lorenzen's) land. It is also true that Lorenzen first learned of defendant's land through the advertisement of Barnes, and that plaintiff was trying to sell him another piece; but a jury may have found that, although Lorenzen first learned of the land through Barnes, and talked with him about it, he abandoned his negotiations with Barnes and took the matter up with plaintiff. Plaintiff was the first one to bring Lorenzen and defendant together, and, while they did not then close the deal, defendant promised to take the matter up the next day, which he did, and Lorenzen would not even then agree to sell his own land until plaintiff had defendant's promise to sell to Lorenzen. Obtaining that promise, he sold Lorenzen's land, and the next day the deal with defendant was closed. Assuming as we must, that plaintiff had an agency for the sale of defendant's land, it was a fair question for the jury to decide whether or not it was through plaintiff's efforts that the parties were brought together and induced to close the deal. The instructions given made the law of the case, save as they are complained of by defendant, and the complaints lodged against them are without merit. We have no occasion therefore to discuss the legal propositions involved or to make any reference to the authorities cited by counsel.

Ordinarily, the question as to whether or not a broker's efforts are the efficient and procuring cause of a sale is one of fact for a jury. *Hanna v. Collins*, 69 Iowa, 51. And it follows that where two or more agents have the property listed, and each does something toward effecting a sale, the question as to which one's efforts induced it is also for a jury.

Of course, both are not entitled to a commission, and under our system, it is generally a question for a jury to determine which one is of right entitled to it. Defendant should not have paid either agent, but have brought them

both into court, leaving the matter of which one was entitled to the commission to a jury. By reason of his failure to do so he may have to pay both. The case is close in its facts; but the testimony is not so clearly against the verdict as to justify us in setting it aside. In support of our views we quote the following from *Higgins v. Miller*, 109 Ky. 209, (58 S. W. 580): "Our opinion is that, when property has been listed for sale with a number of real estate agents, the one who succeeds in bringing the seller and purchaser together, and induces them to enter into the contract, is the one who has earned the commission; and this is true, regardless of the question as to who first introduced the seller and purchaser. In *Vreeland v. Vetterlein*, 33 N. J. Law, 247, the court had under consideration the question of commission where a number of real estate brokers were endeavoring to consummate a sale. The court said: 'Now, in this competition, the vendor of the property is to remain neutral. He is interested only in the result. But when either of the agents thus employed brings a purchaser to him, and a bargain is struck at the required price, on what ground can he refuse to complete the bargain? Can he say to the successful competitor, This purchaser was first approached by your rival, and you should have refused to treat with him on the subject?' There is no legal principle upon which such a position could rest. It is contrary to the usages of everyday commerce. Every advertisement of a stock of goods for sale has a tendency to carry off the customers of rival dealers. And if, therefore, it should be known to the vendor of the property that the agent, who introduces a purchaser to him, has, by the usual arts of competition, taken such purchaser out of the hands of his rival, I am not aware of anything in the law which would justify such vendor in a refusal to complete the contract.'" See, also, in support of the same doctrine, *Gilbert v. McCullough*, 146 Iowa, 335; *Edwards v. Pike*, 49 Tex. Civ.

3. SAME: compensation: conflicting claims.

App. 30, (107 S. W. 586); *Dalke v. Singer*, 56 Wash. 462, (105 Pac. 1031, 27 L. R. A. (N. S.) 195); *Jarvis v. Schaefer*, 105 N. Y. 289, (11 N. E. 634); *Scott v. Lloyd*, 19 Colo. 401, (35 Pac. 733).

No prejudicial error appears, and the judgment must be, and it is, *affirmed*.

WEAVER and EVANS, JJ., dissenting.



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## ACTIONS

### ACTIONS.

**Delay in prosecuting: Dismissal: Discretion.** Where a testator executed conveyances at the same time he executed his will and they were a part of the same transaction, several years' delay in prosecuting an action to set the conveyances aside on the ground of mental incapacity, pending a contest of the will on the same ground, was not such laches as to require a dismissal of the action; and where the motion to dismiss was not made until after the filing of a supplemental petition indicating an intention to proceed with the suit, its denial was within the court's discretion. *Wiltsey v. Wiltsey*, 455.

**Equitable actions: Examination of accounts.** An action to set aside a settlement for misappropriated funds, involving an examination of mutual accounts with several defendants, is one of equitable cognizance, and a transfer of the case to the law docket to determine the amount due from defendants to plaintiff was properly overruled. *Farmer's Sav. Bank v. Aldrich*, 144.

**Election of remedies: Dismissal of appeal.** Plaintiff in this action claiming certain stock certificates under an alleged gift from his father in his lifetime, brought action against the administrator of the father's estate to recover possession of the same, and appealed from a judgment for defendant. Pending the appeal he instituted proceedings in probate to recover the value of the stock from the father's estate upon the strength of a written instrument in which the father promised to pay the son the amount of certain shares of the stock at his death. *Held*, that such proceeding did not amount to an election of remedies or an acceptance of the judgment so as to require a dismissal of the appeal. *Smith v. Meeker*, 655.

**Mandamus: Nature of writ.** The office of mandamus is to compel an officer to take some action regarding a matter of which he has supervision, but if the same involves an exercise of judgment or discretion the court will not undertake to control the conclusion or result of his action, unless fraud and collusion are made to appear. Thus mandamus will not lie to compel a drain-

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age engineer and board of supervisors to approve the performance of a drainage contract and to levy an assessment therefor, where the refusal to approve the same was based on a mere error; as whether the contract had been fully performed. *Federal Contracting Co. v. Webster County*, 362.

**Same: Denial of writ: Procedure.** In mandamus proceedings to compel the acceptance of a drainage project and the levy of an assessment therefor, in which the relator sought recovery on the contract only and not upon *quantum meruit*, and he was not entitled to mandamus because the contract had not been fully performed, the order denying the writ will be affirmed and the cause remanded for the purpose of allowing the relator to amend his pleading and try out his right to recover on *quantum meruit* in a law action. *Idem*.

**Probate proceedings: Review on appeal.** A proceeding to revoke the guardianship of minors and award their care and custody to a parent is in probate, triable as an ordinary action and not *de novo* on appeal, and therefore the exclusion of evidence to which no proper exception was taken will not be reviewed. *Brem v. Swander*, 669.

**ACCOUNTING.** See MORTGAGES.

**Appeal: Review.** The appellate court in a suit for an accounting, involving a large number of items, will not act as a master in chancery and state the account between the parties, where the decree appealed from gives no intimation of the claims allowed and disallowed, but will classify the items, giving its view thereon, and remand the case for the entry of judgment in conformity therewith. *Kinhead v. Peet*, 199.

**ADVERSE POSSESSION.** See REAL PROPERTY.**AGENCY.**

**Commissions: Sale by third person.** A broker authorized by the owner to procure a purchaser for real estate is not entitled to a commission unless he was the procuring cause of the sale. In this case the sale was made by a third person who learned that the farm was for sale by a casual conversation with one of the partners of the agency, but he was not aware that his informant was a partner and he made no express agreement to act as a subagent. *Held*, that as the plaintiffs did not have the exclusive right of sale, and as the sale was effected by the third party acting independently of them, and not as subagent, plain-

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tiffs were not entitled to a commission. *Kruse & Bishop v. Houser*, 661.

**Same: Evidence.** A real estate broker in a commission action may show that defendant made no other objections to a contract of sale tendered him than such as were enumerated by him at the time of the tender. *Dunlap & Co. v. Anderson*, 488.

**Same: Instructions: Conformity to issues.** Defendant's evidence in this action tended to show an agreement between the broker, the purchaser and the owner, that the contract of sale should be left with the owner and if his wife would sign or accept it, it should be regarded a sale, otherwise not; and there was contention that the terms of sale were agreed upon when the land was listed with the broker. *Held*, that an instruction to the effect that if the jury so found the plaintiff could not recover was proper as presenting the issue tendered by such evidence. *Idem*.

**Same: Ratification.** Where the evidence in a broker's action for commission was not such as to require an instruction on the subject of ratification of the agent's acts, its omission in the absence of a request therefor was not erroneous. *Idem*.

**Same: Exclusion of evidence: Harmless error.** In an action to recover a commission for finding a purchaser for land, defended on the ground of abandonment of the agency, the exclusion of plaintiff's testimony that he solicited others to purchase was not erroneous, as at the time it was offered no evidence of abandonment had been adduced and the excluded evidence therefore had no relevancy. But even if the ruling was erroneous it was not prejudicial, as the witness was subsequently permitted to testify to that fact. *McFarland v. Boucher*, 716.

**Termination of agency: Burden of proof: Instructions.** To entitle a broker to a commission for finding a purchaser for land he must establish the fact that the purchaser was found during the existence of the agency; but when the agency has been established the owner has the burden of showing its abandonment prior to the production of a purchaser. *Idem*.

**Same.** Failure to instruct on the subject of abandonment of the agency was not erroneous, where there was no request for such an instruction, and those as given by the court were correct. *Idem*.

**Duration of agency.** When the duration of a broker's agency is not fixed it will continue for a reasonable length of time. *Idem*.

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TO

APPEAL

**Abandonment of agency: Evidence.** Where a broker after repeated efforts to find a purchaser stated to the owner that he could not sell the place it indicated an abandonment of the agency. *Idem.*

**Same: Compensation: Evidence.** A broker authorized to find a purchaser for land need only show that he was the efficient and procuring cause of the sale, and that it was through his efforts that the sale was finally consummated; and even though the land may have been listed with another agent who first endeavored to sell it to the same purchaser he is not required to show an abandonment of the negotiations by that agent. *Fenton v. Miller*, 747.

**Same: Efficient and procuring cause: Evidence.** Ordinarily the question of whether a broker's efforts were the efficient and procuring cause of a sale, or which of two or more brokers with whom the land was listed in fact induced the sale, is for the jury. In this case the evidence is held sufficient to support a verdict for plaintiff, although another agent had the land listed and had first seen the purchaser about buying it. *Idem.*

**Same: Compensation: Conflicting claims.** Where land is listed for sale with different agents and each is claiming the compensation, the owner, to protect himself, should pay neither until the right thereto has been judicially determined, otherwise he may have to pay both. *Idem.*

## ANIMALS.

**Domestic animals: Ownership of increase.** In the absence of an agreement to the contrary the increase of domestic animals belongs to the owners of the dams. *First Nat. Bank v. Eichmeier*, 154.

## APPEAL. See CRIMINAL LAW—DRAINAGE—TAXATION.

**Certification of record.** A certificate of the proceedings of a trial written in shorthand is not such a certification of the report of a trial as the statutes require; the same should be written out in long hand. And a complete translation of the record and certificate certified by the reporter and judge after the time for filing a bill of exceptions as fixed by the statute, will not cure the previous defective certification. *Howerton v. Augustine*, 17.

**Amended abstract: Motion to strike.** A motion to strike an

**APPEAL Continued**

amended abstract because not filed in time will be overruled, where it appears that the same was submitted simply as the basis for a motion to dismiss the appeal. *Heim v. Resell*, 356.

**Amended abstract: Diligence.** Where the appellant, after the filing of a motion to affirm the judgment on the ground that the shorthand notes were not filed in time, had the record below corrected to show that the notes were filed during the trial term and soon thereafter filed an amended abstract showing that fact, though only a short time before the date for submission of the case, such lack of diligence was not made to appear as to justify striking the abstract and affirming the judgment on motion. *Swanson v. Railway Co.*, 78.

**Discretion: Prejudice.** The granting of a new trial on the ground of misconduct in argument is largely a matter of discretion; and when asked to reverse the ruling the appellate court must not only find that the language was technically improper but that it was also prejudicial. In the instant case the evidence fails to justify a finding of prejudice or that the trial court abused its discretion in refusing a new trial. *Idem*.

**Filing of amended abstract.** Where no prejudice arose from failure of the appellee to file his amended abstract within the time prescribed, but he did so sometime before the cause was for submission, and the same was in part at least necessary, appellant's motion to strike the same should be overruled. *Fallon v. Amond*, 504.

**Delay in filing abstract.** Delay in filing an amendment to an abstract, not the fault of appellee and from which no prejudice results, will not be stricken because of the delay. *First Nat. Bank v. Eichmeier*, 154.

**Same: Service of notice: Record evidence.** The recital in a judgment that a party appeared to the action by counsel and in person is conclusive that notice of appeal was served upon such party, as against the denial, unsupported by affidavit, that the counsel acknowledging service of notice of appeal was not such counsel. *Idem*.

**Same: Amendment of abstract: Waiver of defects in record.** In filing an amendment to the abstract the appellee does not waive objections to alleged defects in the preservation of the record, but he may amend subject to the ruling on a denial that the evidence was ever filed or properly certified. *Idem*.

## APPEAL Continued

**Same: Establishment of the record.** The court has authority to establish the record of a cause as it originally existed at any time: Thus where the certificate attached to the shorthand report was inadvertently removed and a substituted certificate, neither entitled, dated nor signed by the reporter was attached, the appellant was entitled to a correction of the certificate in accordance with the original, although more than a year had elapsed since entry of the judgment. *Idem.*

**Same: Sufficiency of record.** The evidence on the motion in this case to establish the original certificate attached by the official reporter is held to support a finding that the original certificate was detached by the reporter and inadvertently replaced by a defective one. *Idem.*

**Conclusiveness of verdict.** The appellate court will not reverse a verdict rendered upon conflicting evidence, although it might have reached a different conclusion from the evidence. *Wilbur v. Buckingham*, 194.

**Sufficiency of abstract: Objection.** An abstract will not be stricken because of failure to number the lines, where the same was filed before the adoption of rules requiring numbering. And failure to include exhibits in an abstract must be taken advantage of by denial and not by a motion to strike. *Idem.*

**Necessity for exceptions.** It is the general rule that the appellate court will not review a ruling of the lower court to which no exception has been taken; and this is true in equity cases if anything more is involved than the mere question of which party is entitled to recover on the facts and issues involved. So where the lower court after reversal of an inheritance tax proceeding set aside its order and judgment upon a stipulation of the parties to that effect, reserving for further consideration a claim that the tax was excessive, and upon a subsequent hearing reduced the former judgment, an exception to the final order was essential to a review on appeal. *Gould v. Morrow*, 461.

**Notice: Failure to state date of judgment.** It is not fatal to the jurisdiction of the Supreme Court that a notice of appeal from a single judgment in the case fails to state the date of judgment appealed from; nor would the fact that a wrong date was stated defeat its jurisdiction. *Henderson v. Supervisors*, 283.

**Same: Appeal to district court: Notice: Service.** Under the present statutes the filing of notice of appeal from an assessment

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in drainage proceedings with the county auditor, together with a bond duly approved by him, is sufficient to transfer the cause to the district court, without serving the notice on the petitioners for the drainage improvement. *Idem.*

**Waiver of error.** Alleged errors concerning which there is no brief or argument will not be reviewed on appeal. *State v. Conklin*, 216.

## ATTACHMENT.

**Garnishment: Intervention.** A third person claiming a garnished fund may intervene in the garnishment proceeding and assert his right thereto, even after judgment has been entered in the principal action in aid of which the garnishment was made. *Dolph v. Cross*, 289.

**Same: Answer of garnishee.** It is not only the right but the duty of a garnishee to disclose all the facts within his knowledge bearing upon the ownership of the garnished funds. *Idem.*

**Same: Special bank deposits: Priority of right thereto.** Where a bank deposit is made for the purpose of meeting checks already drawn against the same and the bank officials are so informed, it becomes a special deposit, to which the check holders for whose benefit it was made, have a superior right to that of a garnishing creditor of the depositor; as a deposit of that nature does not make the bank merely a debtor of the depositor. *Idem.*

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**Attorney and client: Summary proceedings: Jurisdiction.** Where an attorney receives money directly from his client in the county of his own residence, to be applied for his client in a proceeding in another county, and he fails to make the application as directed, the court of the county of his residence has jurisdiction to proceed against him summarily to recover the sum. *Emanuel v. Cooper*, 572.

**Same: Termination of relation.** An attorney's duty to his client ceases ordinarily when the proceeding respecting which he was employed has been terminated adversely to his client; so that if he thereafter receives money to satisfy the judgment he does so in a new relation not necessarily connected with the original action. *Idem.*

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to

## BAILMENTS

**Same: Bond: Sufficiency.** The giving of a second bond to discharge an attorney's lien, because of some defect in that originally given, which was sufficient in form and substance and was filed before the determination of the proceeding, was a substantial compliance with the statute and protected the attorney, although the same was not given for some little time after the proceeding was commenced: And the fact that the attorney gave a counter bond under the statute would not prevent the client from recovering the money due him. *Idem.*

**Same: Counterclaim by attorney.** While an attorney may be allowed for his services in a summary proceeding to recover money advanced to him, he can not recover in the absence of any evidence of the value of his service. *Idem.*

**Attorney's liens: Notice.** An attorney is entitled to a lien for a general balance of compensation upon money due his client in the hands of the adverse party, whether his right to compensation grows out of a written or oral contract, contingency, *quantum meruit* or a fixed amount; and notice thereof need not state the details of his employment. *Cheshire v. Railway Co.*, 88.

**Same: To what lien attaches.** A contract to prosecute an action for personal injury for a portion of the damages recovered is sufficient to authorize a lien upon money paid the client, as a compromise and settlement of the claim. *Idem.*

**Same: Settlement of action: Compensation of attorney.** Where plaintiff in a personal injury action secretly settled the same with the defendant, the attorney's agreement to prosecute the action for a portion of the sum recovered was waived and he thereby became entitled to the agreed compensation as against the plaintiff and also defendants, when served with notice of the lien. *Idem.*

## BAILMENTS.

**Pleadings: Variance.** Plaintiff in this action alleged that he leased certain picture films to defendant with the understanding that they should be returned in good condition, and also alleged negligence in handling the same. Defendant admitted the agreement to return and the case was tried on the issue of negligence. *Held*, that plaintiff was entitled to recover notwithstanding the plea of special contract. *Miller v. Miloslawsky*, 135.

**Same: Reasonable care: Burden of proof.** Where property is delivered to a bailee in good condition and is returned in a

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damaged condition the law presumes negligence, and the burden is upon him to show that he exercised the required care. *Idem.*

**Same: Negligence: Evidence.** In this action for injury to moving picture films by a bailee, the evidence is held sufficient to show that they were negligently handled by defendant and to support a verdict for plaintiff. *Idem.*

**Same: Expert evidence.** A witness having had experience in the handling and use of picture films is competent to give an opinion as to what caused the injury to the same. *Idem.*

**BANKS AND BANKING.** See ATTACHMENT—TAXATION.

## BANKRUPTCY.

**Preferences: Payment by another.** Where an alleged insolvent gave a chattel mortgage to secure a debt and afterwards sold the mortgaged property subject to the mortgage, the fact that the purchaser instead of the insolvent paid the mortgage, was immaterial on the question of whether the payment constituted a preference. *Wickwire v. Savings Bank*, 225.

**Same: Intent: Instruction.** Where the question of intent with which a particular act was done is involved, whether arising in a criminal or civil action, an instruction defining intent is proper: As where the question was whether an insolvent intended to create a preference by securing one of his debtors. *Idem.*

**Same: Instructions: Definition of words.** Definition of the word "preference" as used in an instruction regarding preference of creditors in bankruptcy is not required, in the absence of a request therefor. *Idem.*

**Same: Intent of parties: Evidence.** The verdict of a jury in a cause properly tried and submitted will not be set aside if there is any substantial evidence in its support. In this action by a trustee in bankruptcy to recover a claimed preference the evidence is held sufficient to require submission of the issue and to support a finding of insolvency at the time the bankrupt executed a mortgage alleged to constitute the preference; that he intended thereby to give a preference, and that the mortgagee intended to secure his claim to the exclusion of other creditors. *Idem.*

**BILLS AND NOTES.** See NEGOTIABLE INSTRUMENTS.

**BONDS.** See ATTORNEYS.

**BOUNDARIES.** See REAL PROPERTY.

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**BROKERS.** See AGENCY.**BURGLARY.** See CRIMINAL LAW.**CARRIERS.** See RAILROADS.

**Injury to live stock: Negligence: Burden of proof.** Where a shipper receives live stock for transportation then in good condition, and is charged with the exclusive care and control of the same, proof of its bad condition at the point of destination raises a presumption of negligence in its transportation, which the carrier must overcome to avoid liability therefor. But where the shipper or his agent accompanies the stock, and in consideration for his transportation undertakes to load, unload, feed and care for the same, he must not only show its damaged condition at the point of destination, but also that the injury was not the result of his negligence but that of the carrier. Where, however, the shipper shows that the injury was not the result of his negligence, delivery of the stock in a damaged condition at the point of destination raises the presumption of negligence on the part of the carrier; but the burden continues upon the shipper throughout to establish the negligence of the carrier. *Mosteller v. Railway Co.*, 390.

**Injury to live stock: Burden of proof.** Where an agent of the shipper of live stock accompanied the same for a portion of the journey, and during that time it was claimed the stock was injured by exposure to heat, in seeking to recover damages for the injury the shipper had the burden of proving that the exposure of the stock was the result of the defendant's negligence and not that of his agent. *Wilke v. Ill. Cent. Ry. Co.*, 695.

**Same: Reasonable care.** A carrier of live stock unaccompanied by the owner or his agent is only held to an exercise of reasonable care to avoid injury to the stock. *Idem.*

**Same: Burden of proof: Instructions.** An instruction in an action for injury to live stock while in transit that the shipper has the burden of showing his freedom from negligence, will not give the carrier the benefit of the rule imposing on the shipper, whose agent accompanies the stock, the burden of proving that the injury was the result of the carrier's negligence. *Idem.*

**Same.** Where the jury failed to agree on a verdict for plaintiff until after the court had given an additional instruction on the desirability of agreeing, if practicable, errors in the instructions as to the burden of proof and degree of care required of the defendant were prejudicial. *Idem.*

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TO COMPROMISE AND SETTLEMENT

**Limitation of liability by contract: Federal statutes: Power of state.** The statute of this state which declares invalid any contract with a railway company whereby an attempt, by means of an agreed valuation of property shipped, is made to limit the liability of the company for negligent transportation, is not superseded by the Acts of Congress relating to interstate commerce; as the statute was in force and had been held valid prior to the action of Congress; and the state is not deprived thereby of its right to enact such a statute by virtue of its police power. *Cramer v. Railway Co.*, 103.

**Same: Filing of rates with Interstate Commerce Commission: Effect.** The filing with the Interstate Commerce Commission of a schedule of rates raises no presumption that the commission agreed to such rates, or to the proposed conditions of shipment, and thus gave its sanction to the class of contracts prohibited by our statute, so that it may be said the power of the state has been superseded by Federal action; especially in view of the Federal statute providing that an initial carrier shall be liable for the negligence of any connecting carrier, notwithstanding any contract or regulation to the contrary. *Idem.*

**Same: Interstate shipments: Contract: Liability: Invalidity: Effect.** The determination that a contract for an interstate shipment of property, providing that in case of loss the shipper can only recover the agreed value, is invalid, does not operate to give the shipper a rebate, even though a lower rate was charged because of low valuation, but simply affords him an opportunity to recover his actual loss. *Idem.*

**Same.** Filing a schedule of transportation rates with the Interstate Commerce Commission, at a time when the Commission had no power to fix rates, in which one rate was made to shippers in consideration for a stipulated recovery value in case of loss, and another rate where no such stipulation was made, does not determine the validity of the contract but leaves the question to the state courts; and a determination by a state court that the contract is invalid does not result in giving to a shipper by that method a less rate than that required by law. *Idem.*

**CERTIORARI.** See CONTEMPT.

## COMPROMISE AND SETTLEMENT.

**Consideration.** Where notes were settled in full before maturity by part payment, and in effecting the settlement property was turned over by the debtor when the same might have been re-

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tained by him and the proceeds turned to other creditors, the settlement was supported by a sufficient consideration and the debtor and his guarantors were discharged. *Hamilton Nat'l Bank v. Nicholson*, 369.

**CONCEALING STOLEN PROPERTY.** See **CRIMINAL LAW**.

**CONSTITUTIONAL LAW.** See **STATUTES**.

**COSTS.** See **ESTATES OF DECEDENTS—INTOXICATING LIQUORS**.

**CONTEMPT.**

**Certiorari: Findings of lower court: Conclusiveness.** Where contempt proceedings are brought to the Supreme Court by *certiorari* the findings of the district court do not have the force and effect of a jury verdict, and will be reluctantly interfered with on a fair conflict of the evidence. *McNiel v. Horan*, 630.

**CONTRACTS.** See **CARRIERS—DRAINAGE—RECEIVERS**.

**Alteration: Genuineness of signature.** The genuineness of a signature to a contract is not affected by a subsequent alteration of the contract in a matter not related to the signature. *Hessig-Ellis Drug Co. v. Todd-Baker Drug Co.*, 11.

**Same: Pleadings.** The answer to a suit upon a contract which simply denies the identity of the instrument and the genuineness of the signature does not tender an issue of alteration of the instrument; there must be affirmative allegations setting out the unauthorized alteration. *Idem*.

**Consideration.** A contract made as a substitute for prior agreements which are abandoned and rescinded is supported by a good consideration: That one member of a partnership was a minor at the time of making a partnership agreement is no defense to an action based upon the contract; especially where no personal liability was sought and there was no showing of disaffirmance. *Richards v. Hellen*, 66.

**Contract of employment: Wages: Evidence.** In this action upon the counterclaim of a clerk for services, against his employer's account for goods sold him, the fact that he failed to demand payment from time to time of the excess of his wages over the employee's account, and that he credited himself with cash paid out for the employer when the employer was owing him, were for the consideration of the jury, as against the contention of the employer that there was a contract for compensa-

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tion by which he was entitled to payments prior to the expiration of his service, although not conclusive of the controversy. *Bell v. Kerns*, 62.

**Jurisdiction: Usury: Federal statute: Constitutional law.** A state court having jurisdiction of questions involving usury has jurisdiction, under the federal statute, of actions to recover from a national bank the penalty for taking usury as provided in that statute. And the fact that the statute does not provide for recovering a like penalty from state banks does not render it obnoxious to the constitutional provision that all laws of a general nature shall have a uniform operation. *Ingraham v. Merchants Nat'l Bank*, 408.

**Statute of frauds: Oral contract: Part performance.** An oral contract creating an interest in land which has been partly performed is not within the statute of frauds but may be enforced. In this action the alleged oral contract permitting the construction of a tile drain across plaintiff's land to drain the land of defendant, in which the evidence tended to show part performance by the laying of tile in plaintiff's land, was not within the statute of frauds. *Fallon v. Amond*, 504.

**Same.** An oral contract creating an interest in land is not rendered absolutely void by the statute of frauds, but the statute relates to the question of proof, which is ordinarily one of law; and especially where there has been a part performance. *Idem*.

## CONVEYANCES.

**Delivery of deed: Presumption: Burden of proof.** Where the grantee in a deed is in possession of the same and of the property conveyed thereby it will be presumed that the deed was delivered, and the burden of establishing nondelivery is upon the party alleging it. *Schurz v. Schurz*, 187.

**Same: Evidence.** Delivery of a deed is so largely a question of intent of the parties that no particular course of conduct can be said as a matter of law to be necessary to its accomplishment, but where the grantor or one acting for him passes the deed with intent to transfer title to the property, there is a valid delivery; and it is generally held, especially as between parent and child, that the placing of a properly executed conveyance in the hands of a third person, to be delivered to the grantee upon the death of the grantor, is a valid delivery. In this case the evidence is held to justify a finding of an effective delivery. *Idem*.

## CONVEYANCES Continued

**Incumbrance: Notice: Reformation: Evidence.** The record of a contract creating a lien upon property is sufficient to charge a purchaser with notice of the obligee's rights, and to render it effective as to him against the purchaser, but is of slight significance on the question of whether there was a failure to except it from the covenants of the grantor's deed through mutual mistake; although actual notice to the grantee of the existence of the incumbrance would be important, as sustaining the grantor's contention that the purchaser was to assume the same and that through mutual mistake the deed failed to so state. *Schimmelpfenning v. Brunk*, 177.

**Same: Breach of incumbrance: Measure of damages.** Where the incumbrances consisted of a contract to furnish power for a specified time upon monthly payments at less than the cost of producing the power, upon performance by the grantee he should recover of the grantor either the monthly loss as it accrued, or should be charged with a lump sum equal to the total present worth of each monthly instalment. *Idem*.

**Same: Amount of recovery.** Recovery for breach of covenant in a deed can not exceed the amount of consideration paid therefor, with interest. *Idem*.

**Same.** For the purpose of determining the amount of recovery for breach of covenant in a deed the true consideration therefor may be inquired into by parol. *Idem*.

**Testamentary disposition of property.** Where a deed conveys to the grantee the property itself, the interest so created, whether it be in fee or merely a life estate contingent upon the death of the grantors, begins with the making and delivery of the instrument and not from the death of the grantor; and is not testamentary in character although possession may be postponed until the death of the grantor. *Prindle v. Orphans Home*, 234.

**Same: Construction: Repugnancy.** Where the granting clause in a deed creates an estate of inheritance there may be a reservation of a life estate consistent therewith; but when the grantors attempt still further to cut down the estate of the grantee to a contingent right to use and occupy the property for life, after the expiration of the reserved life estate in the grantors, such a provision becomes entirely repugnant to the grant in fee and can not be given effect. *Idem*.

**Same: Remainders: Parties.** Where the granting clause, as in this instance, made no mention of a charitable institution but conveyed the property to the grantee and his heirs, a subsequent

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CRIMINAL LAW

provision in the habendum clause for a remainder over to the institution is invalid, it not being a party to the instrument.  
*Idem.*

**CORPORATIONS.** See TAXATION.

## CRIMINAL LAW.

**Burglary: Confession: Evidence.** Admission by defendant of a fact competent in establishing his guilt of the crime charged may not be equivalent to a confession of the crime: Thus where defendant charged with burglary was told by the officer that the state had positive proof of his guilt but that if he would give up the stolen property it would save the necessity of locking him up and procuring a search warrant, and without protest he produced the stolen property, his admission of the theft was not a confession of the burglary, though competent evidence thereof; nor was it the result of duress. *State v. Skaggs*, 381.

**Same: Evidence.** The admission of evidence not tending to connect a defendant with the crime charged is not prejudicial: Thus the statement of defendant when arrested that if the officer would ease up on him he could furnish him with valuable information concerning matters in the community, was not prejudicial.  
*Idem.*

**Same: Conduct of accused: Cross-examination of accused.** Where a defendant has made no claim that he was influenced by fear to make certain statements respecting his connection with the crime charged, the cross-examination of a witness who had detailed the statements, which failed to direct the attention of the witness to any particular statement, was properly refused.  
*Idem.*

**Same: Instruction: Infringing on province of jury.** On a prosecution for breaking and entering in which the defendant claimed to have entered the building through an opening already made, an instruction that the jury should consider the defendant's testimony and also the evidence as to how the opening was made, and whether it was reasonable that a person would make an opening large enough to go through unless intending to enter the building, while argumentative and intrenching on the province of the jury, is held to have been without prejudice.  
*Idem.*

**Burglary: Recent possession of stolen property: Instruction.** Where the evidence tended to show that property stolen from the house defendant was accused of burglarizing was in his posses-

**CRIMINAL LAW Continued**

sion a short time after the burglary, an instruction on the subject of recent possession of stolen property was proper. *State v. Harris*, 592.

**Same: Other like crimes: Instruction.** An instruction in this case regarding evidence of other like crimes, the evident intent of which was to tell the jury that the same should not be considered for the purpose of showing that the premises in question were unlawfully entered, but simply to identify defendant as the person entering it, was proper. *Idem*.

**Concealing stolen property: Effect of verdict.** Conviction for aiding in the concealment of numerous stolen articles, no election as to the particular article having been required by the court, is an implied conviction for aiding the concealment of all articles enumerated in the charge. *State v. Conklin*, 216.

**Same: Possession.** It is not essential to a conviction for concealing stolen property that the accused should have had actual possession of the same; it is sufficient if he knew it was stolen and aided in its concealment. *Idem*.

**Larceny: Proof of value: Instructions.** Where all the evidence on a prosecution for larceny placed the value of the stolen property at more than twenty dollars, and the court charged that the state must prove the value beyond a reasonable doubt, there was no necessity for the court to further instruct that if there was a reasonable doubt as to the value it must be fixed at twenty dollars or less, and omission to do so was not erroneous. *State v. Hayward*, 265.

**Same: Circumstantial evidence: Instruction.** Where the evidence on a trial for larceny showed that defendant was at the place where the property was stolen from shortly before the larceny and that shortly afterward the property was found in his possession, and the court fully instructed on the effect of recent possession, failure to instruct with respect to circumstantial evidence was not erroneous, especially as there was no request therefor. *Idem*.

**Same: Recent possession: Instruction.** An instruction that where the possession of recently stolen property is unexplained the presumption arises that the person in possession thereof is the one who committed the larceny, and in the absence of any explanation the fact of such possession is sufficient to warrant conviction, unless the facts and circumstances disclosing the possession and nature of it are such as to leave a reasonable doubt

## CRIMINAL LAW Continued

whether such person may not have come honestly into the possession of the property, is correct. *Idem.*

**Malicious threats to extort: Indictment: Duplicity.** The statute relating to malicious threats to accuse another of an offense, or to do an injury to his person or property, with intent to extort moneys, covers several methods whereby the crime may be committed, but the acts constitute but one offense although stated disjunctively; and it is proper for an indictment to charge the crime as having been committed by one or all of the methods stated in the statute. *State v. Browning, 37.*

**Same: Sufficiency of indictment.** An indictment charging that defendant unlawfully, maliciously and feloniously threatened to do injury by threatening to forcibly arrest and place in jail the parties named, with intent to extort money, sufficiently charges that the threat was of an unlawful arrest, over the objection that it might have been lawful; as the gist of the crime is the threatened injury to person or property with the view of gaining some pecuniary advantage, and it is immaterial whether the accused might or might not have made a lawful arrest, where the crime is committed in that manner. *Idem.*

**Same: Evidence.** On this prosecution for making an unlawful threat of arrest with a view of extorting money, defendant claimed that the parties making the charge were conducting a house of illfame and that one of them had offered sexual intercourse with accused just prior to the threatened arrest. *Held*, that evidence that the one claimed to have offered unlawful intercourse was sick at the time and the number and ages of her children was competent on that issue; but if this were not so, no such prejudice resulted as would justify a reversal because of its admission. *Idem.*

**Same: Sufficiency of instruction.** Where the offense charged is simply malicious threats to extort, the element of bribery is not involved, and an instruction that the offense is complete if malicious threats were made with intent to extort money, or to compel the person thus threatened to do an act against his will, whether the person gave any money or not, was proper, and not subject to the objection that it does not sufficiently discriminate between bribery and malicious threats. *Idem.*

**Same: Proof of conspiracy: Instruction.** On a prosecution of several defendants for malicious threats of arrest in order to extort money, proof of conspiracy without alleging the same in the indictment is proper, for the purpose of making each defend-

## CRIMINAL LAW Continued

ant liable for the acts of the other. And the language of the instruction in this instance is not objectionable as making defendant liable for the acts of his codefendants, pursuant to a conspiracy between them alone, but requires the finding of a conspiracy between the accused and all or part of his codefendants, to make their declarations made in his absence admissible against accused. *Idem.*

**Same: Unlawful search: Instruction.** Where it appeared that defendant had no warrant authorizing him to search the residence of the person he is claimed to have threatened with arrest, any error in instructing that accused, as a special police officer, had no authority to serve a search warrant was not prejudicial. *Idem.*

**Same: Bribery: Distinction.** There is a distinction between malicious threats with intent to extort and bribery. If one whose duty it is to make an arrest suggests that for a price he will not do so, or if after arrest he offers to release the accused upon the payment of money or the doing of some act, this is not the crime of making malicious threats; but if one threatens to accuse another of a crime unless he pays money or does something else against his will, for the purpose of extortion, the crime is a malicious threat although it be followed by an arrest. *Idem.*

**Same: Evidence.** The evidence in this prosecution for malicious threats with intent to extort money is held sufficient to support a verdict of guilty. *Idem.*

**Murder: Evidence.** One who inflicts a wound from which death ensues is guilty of homicide, although if properly treated it would not have proved fatal; and evidence that it was not necessarily fatal is not admissible. *State v. Brumo, 7.*

**Provocation: Mitigation of offense.** Abusive or insulting language will not justify an assault or constitute sufficient provocation to reduce to manslaughter an offense which would otherwise be murder. *Idem.*

**Perjury: Evidence.** The false testimony of one charged with having given liquor, within the county, to one in the habit of becoming intoxicated, that he had not furnished the party liquor at a particular place is material. *State v. Young, 4.*

**Same.** The strongly corroborated evidence of one witness testifying to the falsity of accused's testimony will support a conviction for perjury. *Idem.*

## CRIMINAL LAW Continued

**Rape: Evidence: Sufficiency.** On this prosecution for rape the evidence is reviewed and held sufficient to warrant a conviction for assault with intent to commit rape. *State v. McGhuey*, 308.

**Same: Evidence: Competency.** The testimony of prosecutrix that after the commission of the offense she was deeply grieved was not prejudicial to the defendant, as it in no manner tended to connect him with the crime. *Idem*.

**Same.** Evidence that prosecutrix told her parents that defendant had raped her was not objectionable as a conclusion; since it was no more than a statement that intercourse with her had been accomplished by force, which is competent. *Idem*.

**Same: Evidence of complaint: Admissibility.** It is only the voluntary complaint of a prosecutrix for rape that is admissible to strengthen her testimony; but where the statement was made in response to an inquiry under circumstances clearly indicating that she had already made complaint and the inquiry simply called for a verification of its truth, or the inquiry merely anticipated a statement which the complainant was about to make, it is not rendered inadmissible by the fact that the questioner happened to speak first. *Idem*.

**Same: Corroboration: Instruction.** In this action the jury was told that the defendant could not be convicted on the uncorroborated testimony of the prosecutrix, but that it was not necessary to prove the act by other direct testimony, and that neither evidence of complaint nor physical injury were sufficient corroboration, but admissible to support her testimony. *Held*, that the instruction did not in effect direct that such evidence connected defendant with the commission of the crime. And it is further held that the instruction was not objectionable in that it told the jury in effect that independent evidence had been introduced tending to connect defendant with the offense. *Idem*.

**Unlawful arrest: Instruction.** A private person has the right to make an arrest as a peace officer for a felony committed or attempted in his presence: So that an instruction that the accused, a special police officer, was not a peace officer and had no greater authority to make an arrest than a private person would have had, was not prejudicial to the accused, where it appeared that as a private person he had the same authority to make an arrest as a peace officer would have had under the same circumstances. *State v. Browning*, 37.

## CRIMINAL LAW Continued

## CRIMINAL LAW—EVIDENCE.

**Dying declarations.** Statements made in the firm conviction of impending death are admissible in evidence as dying declarations; and when so made the length of time elapsing between the declarations and death is immaterial. *State v. Brumo*, 7.

**Evidence of absent witness: How proven.** The testimony of a witness on the first trial of a criminal case, but who on the second trial is beyond the jurisdiction of court, may be proven in substance by those who heard it, even though it was not taken in shorthand. *State v. Conklin*, 216.

**Evidence of other crimes: Identity of accused.** While as a general rule it is not permissible to show that a defendant has committed other wholly independent crimes from that for which he is being tried, still evidence which tends to identify him as the person who committed the crime charged is competent, although it may incidentally tend to connect him with another and independent crime. *State v. Harris*, 592.

**Exclusion of rebuttal evidence: Prejudice.** Where the state has inquired into other distinct crimes for the purpose of identifying the defendant with the crime charged, the defendant should be permitted to introduce such evidence as will tend to rebut the inferences to be drawn for the state's evidence. The exclusion of the evidence of defendant in this case along that line is held to have been prejudicial. *Idem*.

**Scope of cross-examination.** The testimony of defendant that he had sought employment in a certain city did not justify the court in permitting the state to show by his cross-examination that other like crimes were committed at that place at about the time he sought the employment. *Idem*.

**Reasonable doubt: Instruction.** To justify conviction every essential element of the crime charged must be proven beyond a reasonable doubt, but it is not necessary that such proof consist of independent evidence separate and apart from the other evidence in the case. The instruction in this case is held to so state, though not clearly. *Idem*.

**Same: Presumption of innocence: Instruction.** Where the court instructs that every material element of the crime charged must be proved beyond a reasonable doubt, this of itself pre-supposes the innocence of the accused, and there is no necessity for tell-

**CRIMINAL LAW Continued**

ing the jury that the law presumes every man innocent until he is proven guilty. *State v. Hayward*, 265.

**Witnesses: Capacity of children.** The capacity of a child as a witness can not be raised for the first time on appeal: And where a child is shown to have sufficient capacity to understand an oath, the question of age is not controlling. *State v. Young*, 4.

**CRIMINAL LAW—PRACTICE.**

**Appeal by state: Scope of review.** The defendant against whom an indictment has been dismissed can not be affected directly by a reversal on the state's appeal, and the appellate court therefore need only review such questions as are presented and argued by the state. *State v. Fairmont Creamery Co.*, 702.

**Motion in arrest of judgment.** An objection that the false testimony forming the basis of a charge of perjury was immaterial, can not be raised by a motion in arrest of judgment; such a motion will only lie for some demurrable ground, or when upon the whole record no legal judgment can be pronounced. *State v. Young*, 4.

**Misconduct in argument.** On a criminal prosecution the question of punishment in case of a verdict of guilty is not a matter for the consideration of the jury, and it is improper for counsel in argument to discuss the question; as the duty of the jury is simply to determine the guilt or innocence of the defendant. And where counsel improperly referred to the severity of the punishment as an argument against conviction, the jury should be told to give the statements no consideration. *State v. McGhuey*, 308.

**New trial: Newly discovered evidence.** On a prosecution for murder, alleged newly discovered evidence that decedent was intoxicated at a time and place other and prior to the fatal affray, will not support a motion for a new trial: And evidence that decedent was of a quarrelsome disposition was immaterial, unless known to defendant at the time of the trouble, and if known he could so testify himself. *State v. Brumo*, 7.

**Reception of verdict: Absence of attorney.** The statute only requires the presence in court of the defendant when a verdict is returned in a felony case; so that absence of his attorney is not ground for error, where no request was made that he be present. *State v. McGhuey*, 308.

**Remarks of court.** While it is not the province of the court in a  
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TO

DAMAGES

criminal case to express to the jury any opinion on the guilt or innocence of defendant, or to attempt to coerce the jury into rendering a verdict, still where it appears that the jury hesitates about returning a verdict because of the possible severity of the punishment in case of conviction, it is proper for the court to advise them that their only duty is to determine the guilt or innocence of the defendant, that the question of punishment is purely a matter for the court, and to urge upon them the desirability of agreeing upon a verdict. In the instant case the court's remarks indicate no intention to coerce the jury or to express any opinion on the question of defendant's guilt, and could not have been so understood. *Idem.*

**DAMAGES.** See DRAINAGE—ELECTIONS—FRAUD—NEGLIGENCE.

**Instruction.** Where the jury in a personal injury action is limited to a consideration of the present loss to decedent's estate, and is told to consider only his age, occupation, wages, condition of health, ability to earn money, habits of industry and probable duration of life, concerning which there was evidence, and is further told that decedent was liable to die at any time, failure to instruct as to the contingencies of ill-health, non-employment, diminution of earning capacity, which are entirely speculative, and to suggest that a verdict for any amount not exceeding that prayed for, might be returned, was not erroneous, in the absence of a request therefor. *Grace v. Railway Co.*, 418.

**Same.** Where the court made no suggestion in its instructions that it would be proper to return a verdict for the amount prayed for, and the verdict was for less than that amount, defendant was not prejudiced by an instruction limiting the recovery to the amount asked. *Idem.*

**Same: Evidence: Interest tables.** Interest tables relate merely to matters of computation, and their exclusion when offered to show what a certain sum would amount to at different rates, for a period approximating decedent's expectancy, was not erroneous. *Idem.*

**Same: Excessive verdict.** In this action for the death of an interurban conductor, in view of his age, earning capacity and accumulations, a verdict for \$11,000, is held excessive and is reduced to \$8,000. *Idem.*

**Excessive verdict.** A verdict for \$6,000, for severe and permanent injury to the foot of plaintiff, who was a locomotive engi-

## DAMAGES Continued

to

## DRAINAGE

neer, forty-five years of age, earning about \$100 a month, with prospects for increased salary, and who was confined in a hospital for five weeks with medical and surgical expense of \$800, is held not excessive. *Payne v. Railway Co.*, 445.

**Excessive recovery.** In an action for injury to machinery the plaintiff is entitled to recover for broken parts on the basis of their value before injury, with the necessary cost of labor for installing new parts. In this action for injury to an automobile the recovery is held greater than warranted by the evidence. *Wilbur v. Buckingham*, 194.

**Future suffering: Instruction.** An instruction in a personal injury action that recovery for future pain and suffering must be limited to such as may be found from the evidence that plaintiff will suffer is proper, and not objectionable as permitting damages for future suffering not reasonably probable. *Parks v. Town of Laurens*, 567.

**DEEDS.** See CONVEYANCES.

**DRAINAGE.** See ACTIONS.

**Assessment of benefits: Review on appeal.** The determination by a board of supervisors and the trial court that an assessment of benefits for the construction of a drainage district is not excessive will not be disturbed on appeal unless there appears to be a manifest discrepancy or inequality. *Guttormsen v. Drainage Dist. No. 7*, 126.

**Same: Presumption: Burden of proof.** A presumption obtains in favor of the correctness of an assessment of benefits for the construction of a drainage district, and a property owner has the burden of showing that it is otherwise. *Idem*.

**Burden of proof.** One alleging that refusal of drainage officers to approve a drainage contract and levy an assessment therefor was collusive and fraudulent has the burden of proof on that issue. *Federal Contracting Co. v. Webster County*, 362.

**Contract: Consideration.** Where by agreement defendant was permitted to construct a drain over plaintiff's land, on condition that he would lay tile of sufficient capacity to drain the surface water from both farms, a burden was imposed on plaintiff's land and defendant derived a benefit, either of which afforded a sufficient consideration to support the contract. *Fallon v. Amond*, 504.

**DRAINAGE Continued****Same: Breach of contract: Measure of damages: Pleadings.**

Where the plaintiff in an action for breach of a drainage contract claimed the difference in value of the land with and without the improvement as agreed, he was entitled to prove the cost of completing the ditch through his land, as bearing on the measure of damages, without specially alleging such cost. But permission to file an amendment alleging such cost was not an abuse of discretion and resulted in no prejudice, especially in view of the court's instruction that recovery could not be had for more than the cost of the improvement. *Idem*.

**Same: Measure of damages.** Where the contract for the construction of a drainage ditch called for the permanent improvement of plaintiff's land, and involved a large expense, the measure of damages for breach of the contract was the difference in value of plaintiff's land with and without the improvement. *Idem*.

**Diversion of stream: Injury to dominant estate: Injunction.**

The owner of a servient estate can not rightfully construct a dam in a stream on his own land so as to cast the water back onto the dominant estate to the injury of the same; and where this is the effect the owner of the dominant estate may restrain a continuance of the dam, even though its purpose was to divert the water of the stream and thus to reclaim land of the servient owner. *Bramley v. Jordan*, 295.

**Same.** The right of a dominant proprietor to have the water leave his estate at its lowest level is a corporeal right which he is entitled to enforce. *Idem*.

**Irregular proceedings: Remedy.** The statute providing an appeal for the review of error and irregularity in drainage proceedings is exclusive, and an independent action for that purpose will not lie, except upon a showing of utter want of jurisdiction. *Hoyt v. Brown, Treasurer*, 324.

**Same: Establishment of district: Finding of necessity: Sufficiency.** The finding of the board of supervisors that the establishment of a drainage district is a necessity satisfies the statute in this respect and is conclusive. *Idem*.

**Same: Service of notice: Waiver of defect.** A mere defect in the notice, or return of service thereof, in drainage proceedings is cured by the voluntary appearance and filing of a claim for damages by the property owner. *Idem*.

**Negligent construction: Evidence.** In this action plaintiff claims

## DRAINAGE Continued

TO

EQUITY

defendant company so constructed its roadbed as to destroy the efficiency of his tile drain thereunder. The defendant pleaded affirmatively that the road was constructed by an independent contractor, and that if there was any negligence it was chargeable to him, and introduced in evidence the construction contract. *Held*, that the contract was not conclusive against plaintiff, not a party to it, but that the question of whether the road was constructed by the contractor was properly submitted, as plaintiff was entitled to meet it by other evidence; and especially so as the contract on its face was incomplete because calling for construction in accordance with specifications to be thereafter presented and attached to the contract, which was not shown to have been done; and because the work was to be done under the supervision of defendant's engineer and was in fact supervised by him; that plaintiff claimed damages for continuing injury to the drain by exposure of the tile to the action of frost; and the further fact that the evidence as a whole showed that defendant acquiesced in the work of construction. *Swanson v. Railway Co.*, 78.

**Same: Negligent construction: Waiver of damages.** A release of all damages to land by reason of constructing, operating and maintaining a railroad thereover, in an ordinary right of way deed, applies only to such damage as results to plaintiff from a proper and reasonable construction and maintenance of the road; it does not apply to damage arising out of negligent construction or breach of the condition upon which the deed was delivered. *Idem*.

**Same: Evidence.** While the evidence in this action that plaintiff's tile was destroyed by the action of frost is meagre, yet it is held sufficient to make a *prima facie* case on that issue. *Idem*.

## EQUITY.

**Reformation of instruments: Evidence.** A written contract of sale by one partner of his interest in the firm to his co-partners which names the sum to be paid him, without stating any basis of computing the same, will not be reformed as to the amount to be paid on the ground of mistake unless a clear case of mistake is made out. In this action the evidence is held sufficient to show that the sum named in the contract was the result of a mutual mistake, and was determined by computation from an erroneous invoice of the partnership property. *Slob v. De Mots*, 411.

## Equity Continued

to

## ELECTIONS

**Same: Parol evidence.** The parol evidence rule does not apply to a suit in equity to reform a contract. *Idem.*

**Reformation of instruments: Pleadings: Objection to sufficiency.** The petition in an action for the reformation of a written instrument to make it conform to the agreement of the parties must distinctly set out the original agreement and show what part of the agreement was not included in the writing, or what part of the written contract was not embraced in the original agreement. But where no objection to the sufficiency of the petition is made upon the trial, and both parties proceed on the theory that the issue of mistake was properly pleaded and they acquiesced in the determination of that question, they are bound by the adjudication and can not raise that question on appeal. *Coleman v. Coleman*, 543.

**Same: Parol evidence.** In a suit to reform a written contract to make it conform to the agreement of the parties the rule forbidding the admission of parol evidence to vary the terms of the writing is not applicable, but the conversations and understandings of the parties prior to the execution of the writing are admissible for the purpose of determining the real agreement of the parties. *Idem.*

**Same: Equitable jurisdiction.** Where part of the agreement of the parties was omitted from the writing through an oversight or ignorance of the import of the language used by the scrivener, or the understanding of the parties was not evidenced by the writing, equity will reform it to make it conform to the real agreement. *Idem.*

**Same: Laches.** Where nothing had transpired to indicate that the parties to a written contract understood it differently until suit was instituted thereon, when a mistake was promptly asserted and a reformation prayed, the right to reformation was not barred by laches. *Idem.*

**Same: Evidence of mistake in writing.** The evidence in this action is reviewed and held sufficient to justify the reformation of a written contract to make it conform to the real agreement of the parties. *Idem.*

**ELECTIONS.** See SCHOOLS.

**Challenge of voter: Duty of judges.** The duties of judges of election are ministerial and not judicial, insofar as they relate to administering the oath to a challenged voter and receiving his ballot; and the judges can not arbitrarily refuse to administer

ELECTIONS Continued

TO

ESTATES OF DECEDENTS

the oath or receive the ballot after it has been administered.  
Lane v. Mitchell, 139.

**Same: Damages for refusal of right to vote.** Damages for refusing to administer the oath and receive the ballot of a qualified but challenged voter, when the refusal is wilful and malicious, are not necessarily nominal only, but may be substantial.  
*Idem.*

**ELECTION OF REMEDIES.** See ACTIONS.

**ESTATES OF DECEDENTS.** See CONVEYANCES—WILLS.

**Claims: Burden of proof.** An administrator pleading payment of claims filed against the estate has the burden of proof on that issue. Sheldon v. Thornburg, 622.

**Same: Personal services: Compensation.** While the service and care rendered by one sister at the sick bed of another may ordinarily be presumed to be gratuitous, still it may be of such character and duration as to exclude the idea of gratuity and warrant a finding that there was to be compensation. In this case refusal to instruction that the service was gratuitous was proper. *Idem.*

**Claims: Temporary administration.** A temporary administrator appointed to investigate and report upon a claim of the regular administrator against the estate has no authority to allow more than the amount claimed. Rabbett v. Connolly, 607.

**Same: Allowance: Subsequent correction.** The allowance by the court of a claim against an estate, while not a judgment, is attended by the same presumptions, and ordinarily should be attacked in the same manner. But the probate court has a large discretion and control over the settlement of estates, and at any time before the final discharge of an executor or administrator may correct his accounts and settlements for mistake or fraud, including the erroneous account of a special administrator.  
*Idem.*

**Same: Erroneous allowance of claims: Remedy: Jurisdiction.** Where the heirs of a decedent had no notice of the proceedings for the allowance of a claim in favor of the general administrator, and were not represented and did not appear before the special administrator in resistance of the claim, and its allowance was manifestly erroneous, a motion to set aside the allowance made pending administration was timely, and was a direct at-

## ESTATES OF DECEDENTS Continued

TO

## EVIDENCE

tack justifying relief. And the motion was properly supported by affidavits of the heirs. *Idem*.

**Same: Sale of real estate.** The application of an administrator to sell real estate should be denied where the decedent's indebtedness has not been ascertained and there is a prima facie showing of sufficient personal assets. *Idem*.

**Clerk's fee: How determined.** The real property of an intestate and the rents arising therefrom descend immediately upon his death to his heirs, and except as the same may be required for the payment of debts are not to be considered in estimating the value of the estate, for the purpose of determining the fee which the clerk of courts is authorized to charge for his services in the settlement of the estate. Thus where the intestate left a homestead and real property in another state, neither of which were required for the payment of debts, the value of the same should not be considered in fixing the clerk's fee. In re Estate of Pitt, 269.

**Life estates: Income and increase of property.** In the absence of limitation or restriction the income of property in which a life estate is granted, including the increase of live stock, is the property of the life tenant rather than that of the remaindermen. Milner v. Brokhausen, 560.

**ESTOPPEL.** See GIFTS—REAL PROPERTY.

**EVIDENCE.** See CRIMINAL LAW—EQUITY—GIFTS.

**Documentary evidence.** Standard price lists and market reports shown to be of general circulation and relied upon by the trade are admissible as evidence of the market value of articles therein listed and priced: So that witnesses testifying to the value of such articles may refresh their memory by reference to the price lists thereof. Wilbur v. Buckingham, 194.

**Exclusion of evidence: Harmless error.** The exclusion of evidence regarding a matter which has been established by the undisputed testimony of other witnesses is not prejudicial error. Parks v. Town of Laurens, 567.

**Same.** The admission of other evidence covering the same point as that erroneously excluded cures the error; and where the question arises on appeal from a directed verdict the admitted evidence will be accepted as true. Sevensing v. Smith, 639.

**Same.** Evidence tending to excite sympathy of the jury, when

**EVIDENCE Continued**

not produced for an improper purpose and having no prejudicial effect, is not ground for reversal. *Boice v. Railway Co.*, 472.

**Conversations with a decedent: Waiver of objection.** Where the competency of a witness to testify to conversations with a deceased person is not challenged upon the trial the objection will be deemed waived. *Coleman v. Coleman*, 543.

**Transactions with a decedent: Contracts.** One seeking to enforce a claim against an estate can not testify to any conversation or transaction with the decedent regarding the same: Thus plaintiff, after being called to her sister's home, was incompetent to testify that she had a conversation or understanding with her sister regarding her care and plaintiff's compensation; for, although no attempt was made to repeat the words employed, the mere statement that there was such a conversation or understanding related to a personal transaction within the meaning of the statute, which includes anything said or done in which both the witness and decedent took part, and which decedent, if living, would have the right to deny or affirm. *Sheldon v. Thornburg*, 622.

**Same.** A witness who is disqualified under the statute from testifying directly to a contract or understanding with a decedent can not testify to a state of facts relied upon to support an implied agreement. *Idem*.

**Same.** In seeking to recover a claim against an estate, evidence that a demand therefor was made against the surviving husband or wife is immaterial, although made in the presence of decedent; and in this case it was prejudicial. *Idem*.

**Same.** In the instant case plaintiff's deceased sister requested her by letter to come and care for her and expressed a willingness to pay her expenses, and it is held that the court should have told the jury that the letter could not be considered as evidence that decedent intended to pay plaintiff any compensation for her services, other than her expenses. *Idem*.

**Experimental evidence.** Experimental evidence is admissible where the conditions are shown to have been essentially similar. Thus where it was contended in an action for negligent operation of a handcar, that it was thrown from the track by a stick lying across one of the rails, rather than as a result of the negligence charged by plaintiff, it was proper to permit the testimony of a witness in rebuttal that he had run a handcar over iron obstructions of about the same dimension without derailment. The admission of such evidence however is largely a matter of discretion. *Lehman v. Railway Co.*, 118.

**EVIDENCE Continued**

**Proof of local custom.** A local custom among real estate agents, with reference to assisting each other, can not be proven without a showing that the opposite party knew of the custom. *Dunlap & Co. v. Anderson*, 488.

**Secondary evidence: Self-serving declarations.** Where secondary evidence is resorted to it must be of the best degree obtainable. In this action upon a lost policy of insurance plaintiff contended that a lightning clause was attached to the policy and defendant offered in evidence the policy register and entries of the agent in connection therewith, which failed to disclose a lightning clause. A witness testified that the register was in the hand writing of the agent, since deceased, and if there had been a lightning clause it would have been noted on the register. *Held*, that as the entries were not verified by anyone having a knowledge of the facts recited therein they were self-serving declarations and therefore inadmissible. *Cummings v. Insurance Co.*, 579.

**Documentary evidence.** Nor were the entries admissible under the Code as having been made in a professional capacity or in the ordinary course of professional conduct; as insurance agents are not classed as professional men, nor are their duties in these respects of a professional character, within the contemplation of the Code. *Idem*.

**Witnesses: Oaths.** No particular form of oath to be administered to a witness is prescribed, but if of such character as to be regarded by the witness as binding upon his conscience it is sufficient, although he may regard some other form as more solemn. *State v. Browning*, 37.

**Same: Form of oath: Objection.** Objection to the form of an oath must be made previous to its administration or it will be deemed waived. *Idem*.

**Same: Discrediting evidence.** A witness can not be asked whether he considers some other form of oath than that administered as more binding upon his conscience, for the purpose of discrediting him. *Idem*.

**Examination of witnesses: Scope of inquiry.** A cause will rarely be reversed because of the admission of competent testimony developed on cross-examination, though not within the scope of the direct examination; as this is largely a matter of discretion, and the complaining party may, if he desires, cross-examine upon the new points. *Parker v. Railway Co.*, 254.

EVIDENCE Continued

TO

FRAUD

**Same.** Error can not be predicated on the exclusion of an answer where the witness had fully testified to the fact which the interrogatory was intended to draw out; or where the question is renewed in slightly different form and fully answered. *Payne v. Railway Co.*, 445.

**Discretion.** The court's discretion in sustaining or overruling objections to questions on the ground that they are leading and suggestive, or as improper redirect examination, will not be interfered with where no abuse of such discretion is made to appear. *Idem.*

**Conclusion: Irrelevancy.** The mere conclusion of a witness is not admissible; and where the questions and answers do not fairly tend to aid the jury in ascertaining the facts relating to the matter under consideration, the evidence should be excluded. *Idem.*

## EXTRADITION.

**Habeas corpus.** One held under executive warrant to answer the criminal charge of deserting his wife and children, made against him in another state, can not obtain a discharge on *habeas corpus* by showing that since the desertion he obtained a divorce from his wife in this state and has since remarried; as it will be presumed that the courts of the foreign state will give faith and credit to the decree of our court and properly determine whether the divorce and remarriage bar the prosecution. *Bruynell v. Wies*, 565.

**FORFEITURE.** See LANDLORD AND TENANT.

**FRAUD.** See NEW TRIAL.

**Fraudulent conveyances: Undue influence: Evidence.** While mere solicitation, though urgent, made with the view of securing the execution of a gift or devise of property is not necessarily undue influence, and as a matter of law may not require the setting aside of a will or conveyance thus obtained, yet where such influence is brought to bear upon one whose physical strength is spent and whose mind is shattered by impending dissolution, courts will set aside any advantage thus obtained. *Wiltsey v. Wiltsey*, 455.

**Same: Measure of damages.** In an action for damages based on a misrepresentation of the value of property sold, the measure of damage is the difference between the market value of the

**FRAUD Continued**

TO

**GIFTS**

property as it actually was and the value it was represented to have, unaffected by the market value of other property which was to be exchanged in payment therefor; it being immaterial whether the injured party was to pay for the same in cash or in property. *Stoke v. Converse*, 274.

**Same: Creditors' suits: Relief.** It is not necessary in a creditor's suit against nonresident defendants to set aside a conveyance that the claim be first reduced to judgment, but demand for judgment and to subject the land fraudulently conveyed may be made in the same action. *First Nat. Bank v. Eichmeier*, 154.

**Same.: Knowledge of grantor's intent: Effect.** Although a creditor may know that his grantor's conveyance to him was with intent to hinder and delay other creditors, still he may acquire good title if taken in good faith on his part and in satisfaction of a valid indebtedness due him. *Idem.*

**Same: Husband and wife: Conveyance of homestead: Consent of wife.** A wife is not bound to consent to a conveyance of the homestead, but as a condition precedent to her assent she may require that the transfer of property for which it is exchanged be made to her. And while transactions between husband and wife which have the effect of delaying creditors will be carefully scrutinized still she has the same rights as a vigilant creditor of her husband that others have, and if actuated only by a design to collect what is due her she is not subject to criticism. *Idem.*

**Same: Transactions between husband and wife: Repayment of loans: Reasonable time.** A husband may repay money borrowed in good faith from his wife, and where no definite time for repayment is agreed upon his obligation is to pay within a reasonable time. Evidence held to show that the transactions in question were not fraudulent as to the husband's creditors. *Idem.*

**GARNISHMENT.** See ATTACHMENT.

**GIFTS.**

**Consummation by delivery: Formal transfer.** Delivery of certificates of stock to the donee with intent to transfer the right of ownership is sufficient to consummate a gift without a record of the transfer on the books of the corporation, or a formal assignment or indorsement of the certificates. *Smith v. Meeker*, 655.

## GIFTS Continued

**Same: Subsequent writings: Effect.** Plaintiff's father gave him corporate stock by delivering the certificates to him subject to the payment of a specified sum to each of two grandchildren after the father's death. *Held*, that the execution of instruments by the father thereafter, addressed to the grandchildren, reciting a present division of his property and that he had left his affairs with the plaintiff, and that he had promised to pay plaintiff at his death certain shares of the stock in question, with accumulations thereon, did not negative a present gift of the stock by delivery of the certificates. *Idem*.

**Same: Transfer of title: Evidence.** Where the uncontradicted evidence shows an absolute delivery of the gift to the donee, subject only to the payment of a specified sum after the donor's death, and there is no evidence to indicate an attempt on the part of the donor to exercise further control over the gift, a finding that the donor intended a transfer of title only upon his death is erroneous. *Idem*.

**Evidence: Admissions of a decedent.** The verbal statements or admissions of a deceased person are not alone ordinarily sufficient to establish a gift, but are admissible in evidence; and if other facts and circumstances are shown which fairly tend to show the alleged gift such admissions are often of much value in determining the controversy. In this action the evidence as a whole is held sufficient to establish a gift of real property by decedent to plaintiff. *Albright v. Albright*, 397.

**Same: Self-serving declarations.** The admissions of a donor or grantor which are against his own interest or title, are ordinarily admissible against his devisees or heirs, but his declarations at another time and in his own interest are not competent evidence. *Idem*.

**Parol gift of land: Possession and improvement: Evidence: Statute of frauds.** In this action to establish a parol gift of land it was shown that the donee went into possession a number of years prior to the death of the donor and remained in possession until after his death without rent, making various improvements, consisting of clearing the land of stumps and trees, and the erection of new buildings and repair of old ones, in the aggregate amounting in value to several hundred dollars, and all of a permanent character. *Held*, there was a sufficient showing of permanent improvement to satisfy the statute of frauds and to support a finding of a gift rather than a mere intent to make a gift in the future. *Idem*.

GIFTS Continued

to

INSURANCE

**Same: Acquiescence: Adverse possession: Estoppel.** Where the plaintiff entered into possession of real estate under an alleged oral gift and for many years occupied, managed and controlled it as his own without objection or protest from the donor, who had full knowledge of the plaintiff's acts of dominion over the property, the donor's widow was estopped to claim title adverse to plaintiff. *Idem.*

**HABEAS CORPUS.** See EXTRADITION.

**HUSBAND AND WIFE.** See FRAUD.

**INDICTMENT.** See CRIMINAL LAW.

**INHERITANCE TAX.** See TAXATION.

**INJUNCTION.** See INTOXICATING LIQUORS.

**INSTRUCTIONS.** See AGENCY—BANKRUPTCY—CARRIERS—DAMAGES—NEGLIGENCE.

**Failure to number same.** While the trial court should number the paragraphs of its charge, still if the court's attention is not called to the omission and exception taken thereto at the trial, it is too late to complain on appeal. *Payne v. Railway Co.*, 445.

**Finding to conform to evidence.** An instruction that the jury should "endeavor" to be governed solely by the evidence was not prejudicial, because permitting them to go outside of the record and determine the issues upon their own knowledge, experience or information, where they were also clearly told that plaintiff could not recover except upon proof of his claim by a preponderance of the evidence, that the finding must be from the evidence, and where the nature of the case was such that the jury could not have utilized their own knowledge, except in a general way. *Wilbur v. Buckingham*, 194.

**INSOLVENCY.** See BANKRUPTCY.

## INSURANCE.

**Average clause: Statutes.** A clause attached to a single insurance policy covering several buildings, providing that in case of loss the policy shall attach to each building in proportion to the value which it bears to the aggregate value of the entire property, is not in violation of the statutes relating to insurance; and without it there would be an increase of risk without a corresponding increase in premium. *Dahms & Sons Company v. Insurance Co.*, 168.

**INSURANCE Continued**

TO

**INTOXICATING LIQUORS**

**Same: Average clause: Validity: Statute.** An average clause is not directly nor impliedly prohibited by the statute prescribing a standard form of policy, but may be termed a specification of the property insured; and the statute authorizes the company to attach forms or slips of description, location and specification of the property. *Idem.*

**Same: Construction of policy.** While a policy of insurance should be construed in the sense in which the insured had reason to understand it, still like other contracts force and effect must be given the language used, unless by some ambiguity or craft they are calculated to mislead the insured. *Idem.*

**Provisions of lost policy: Evidence.** In this action upon a lost fire insurance policy the evidence is held sufficient to take the question of whether a lightning clause was attached to the policy to the jury. *Cummings v. Insurance Co.*, 579.

**Same: Loss from lightning: Policy exceptions.** The provision in a policy of insurance that "if the building or any part thereof fall, except as a result of fire, all insurance by this policy on the building or its contents shall immediately cease" has reference to the falling of the building from causes other than those insured against, and does not operate to relieve liability for damages resulting from a fall of the building as the result of lightning, where the policy covers loss from lightning. *Idem.*

**Same: Loss from lightning: Direct damage.** The provision of a policy covering direct loss or damage caused by lightning includes damage to goods from water and debris into which they were thrown by the fall of a building as the result of lightning. *Idem.*

**INTERSTATE COMMERCE.** See STATUTES.

**INTOXICATING LIQUORS.**

**Statement of consent: Termination: Statute.** Chapter 101 of the Acts of the Thirty-first General Assembly changed the law under which a general consent to the sale of intoxicating liquor should continue in force until revoked by a proceeding in the nature of a counter petition, and provided for an absolute and unconditional expiration by mere lapse of time, so that consent to an individual dealer by the municipal authority ceased with the termination of the general consent. *Conly v. Dilley*, 677.

**Same: Effect of termination of general consent.** The Act of the Thirty-third General Assembly limiting the number of saloons

## INTOXICATING LIQUORS Continued

in certain cities and towns, and providing that in cases where the number of resolutions of consent which had been granted exceeded the limit, the council need not cancel a sufficient number to comply with the limitation, does not have the effect to extend the general consent beyond the time fixed by the Act of the Thirty-first General Assembly; so that an individual dealer had no rights under a resolution of the council based on a general consent which had expired by limitation under the latter statute. *Idem.*

**Canvass of statement of consent: Appeal: Operation of saloon.**

A board of supervisors acts judicially and not ministerially in canvassing a statement of consent to the sale of intoxicating liquors; and as there is no provision of statute for a stay of proceedings the board's finding that the statement is sufficient remains in force pending an appeal to the district court from such finding by a citizen, and saloons may operate under it until the finding is reversed. *Hammond v. Waldron*, 434.

**Sale by pharmacists.** Drugs and medicines containing liquor or alcohol, but so compounded that they can not be used as a beverage, may be lawfully sold by registered pharmacists, without a license to sell intoxicating liquors. *McNiel v. Horan*, 630.

**Same.** A preparation of tonic bitters composed of herbs, rock candy, water and thirty percent alcohol is held to have been an intoxicant capable of use as a beverage, and could not lawfully be sold by a pharmacist as a medicine, except under a permit. *Idem.*

**Same: Specification of purpose.** A request for the sale of liquor by a druggist holding a permit must show the purpose for which the liquor is desired, and the statement that it is desired for a "mechanical purpose" is not sufficient; there must be a further specification of the purpose for which it is desired. *Smith v. Foster*, 664.

**Same: Requests for liquor: Unlawful sale.** The fact that a druggist writes in the blank application for the purchase of liquor, as prescribed by statute, the number of the request, the date, and his name and number as a pharmacist, all of which precede the request proper, will not render the sale unlawful; but the statute requiring the purchaser to fill out the request in his own handwriting does not permit the druggist to insert therein the amount and kind of liquor desired, to do which will render the sale unlawful. *Idem.*

**Same: Nuisance: Injunction: Costs.** Upon proof of the illegal

INTOXICATING LIQUORS Continued TO LANDLORD AND TENANT

sale of liquor by a pharmacist, a perpetual injunction should issue against him restraining such sales and he should be taxed with the costs, and the owner of the building should also be enjoined from permitting the premises to be used as a place for illegal sales; although the violation of the statute was technical and without criminal intent, and although the owner had no knowledge of the illegal sales. *Idem*.

**JOINT WRONGDOERS.** See TORTS.

**JURISDICTION.** See ATTORNEYS—COURTS—ESTATES OF DECEDENTS.

**JURORS.**

**Challenge.** Challenge to a juror for cause must specify the ground to be made the basis of an exception on appeal. And where the challenge is on the ground of the relation of client and attorney and the examination of the juror discloses that such relation has terminated the court is justified in overruling the challenge. *Payne v. Railway Co.*, 445.

**LANDLORD AND TENANT.**

**Breach of covenant: Evidence.** In this action by a landlord for breach of his tenant's agreement to destroy noxious weeds on the premises, the evidence is held to support a finding that the covenant was not broken. *Quinn v. Tobiason*, 650.

**Same.** The lease in this case obligated the tenant to exercise reasonable care to destroy noxious weeds and there was evidence tending to show that the most effectual way of doing so was to seed the land to grass. The landlord was obligated to furnish the grass seed, which he failed to do. *Held*, that the tenant was not required to seed the entire premises as a means of destroying the weeds. *Idem*.

**Same: Evidence.** In this action for breach of the tenant's covenant to destroy noxious weeds, statements of the landlord previously made that the farm had increased in value and that the tenant was a good farmer were not prejudicial, and were competent as admissions of the landlord, inconsistent with his contention on the trial that the farm had been damaged by the default of the tenant. *Idem*.

**Forfeiture: Waiver.** Provisions in a lease for re-entry, to distrain for rent or to recover possession in case of default in payment of rent, and in a concurrent contract giving the lessee an optional right to purchase and that the option should cease

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**LANDLORD AND TENANT Continued**

to

**MECHANICS' LIENS**

upon a declaration of forfeiture of the lease are not self-executing, but some affirmative action on the part of the landlord is necessary to create a forfeiture; but this right of forfeiture may be waived by subsequent acceptance of rent money and the assertion of a lien for accruing rent, under the rule that one having two inconsistent modes of redress is bound by his deliberate choice of one. *Blank v. Independent Ice Co.*, 241.

**LARCENY.** See **CRIMINAL LAW**.

**LIENS.** See **ATTORNEYS**.

**MALICIOUS THREATS.** See **CRIMINAL LAW**.

**MANDAMUS.** See **ACTIONS**.

**MARRIAGE AND DIVORCE.**

**Divorce: Adultery: Procuring of evidence: Connivance.** Either a husband or wife, having reason to believe the other guilty of adulterous relations with a stranger, may take measures to secure evidence of that fact without being guilty of either connivance or consent to the wrongful act. In this case the plaintiff's acts in securing evidence of the adulterous relations of the defendant with another were not such as to bar her right to a divorce on that ground. *Engle v. Engle*, 285.

**Divorce: Cruel and inhuman treatment: Evidence.** In this action for divorce, based on cruel and inhuman treatment, the evidence is reviewed and held sufficient to support a decree. *Felkner v. Felkner*, 56.

**MASTER AND SERVANT.** See **NEGLIGENCE**.

**MECHANICS' LIENS.**

**Priority: Evidence.** An affidavit for a mechanic's lien setting forth the date of the contract for material and labor and of furnishing the same is substantial evidence on the issue of the date of the contract, in determining the priority of the lien over a conveyance of the premises and in refuting oral evidence in an action to foreclose the lien, to the effect that the contract was made before the conveyance. In this action the evidence is held to show that the contract for material was made subsequent to a trust deed of the property giving the deed priority over the lien. *Joyce Company v. Carrol L. & H. & P. Co.*, 372.

**Same: Notice of lien.** The right of a grantee of premises who has acquired by the conveyance a title superior to that of a ma-

MECHANICS' LIENS Continued

TO

MORTGAGES

terialman under his lien is not affected by the question of notice of the lien. *Idem.*

## MORTGAGES.

**Mortgagee in possession: Accounting.** A mortgagee in possession holds the property in trust for the benefit of the mortgagor after payment of the debt secured thereby, and where action is brought to redeem, it becomes the duty of the mortgagee to promptly account for his trust. *Kinhead v. Peet, 199.*

**Same.** Where a mortgagee in possession is entitled to wages paid for labor on the mortgaged premises he is also entitled to the cost of boarding the laborers. *Idem.*

**Same.** A mortgagor entitled to redeem from a mortgagee in possession may recover for waste committed to the material injury of the premises. *Idem.*

**Same: Accounting for repairs.** A mortgagee in possession may make such repairs as are reasonably necessary to preserve the estate in the condition in which he received it, and is entitled to credit therefor in a settlement with the mortgagor who is seeking to redeem; but generally he may not go beyond necessary repairs and make betterments at the expense of the mortgagor or of the property itself unless by the mortgagor's express or implied consent. Under this rule the cost of tiling, the erection of new buildings or reconstruction of old ones should not be allowed the mortgagee. *Idem.*

**Same: Cost of releasing attachment.** The amount a mortgagee in possession was compelled to pay to release the property from an attachment, with interest from the date of payment, but not including costs of suit, should be allowed the mortgagee in an accounting upon redemption, especially where it was contemplated by the parties that the mortgage should stand as security therefor. *Idem.*

**Same: Services of mortgagee in possession.** A mortgagee in possession should not be allowed for his own services in connection with the mortgaged property voluntarily rendered and for his own benefit and protection. *Idem.*

**Same: Redemption: Tender: Interest.** Where the amount required to redeem from a mortgage is liquidated and no accounting is required, a sufficient tender will usually arrest the accumulation of interest; but where the mortgagor is in court claiming payment, or a material reduction of the debt because of equit-

## MORTGAGES Continued

TO

## NEGLECT

able counterclaims which he insists should be treated as payments, and is asking for an accounting, the rules does not apply. Yet where the mortgagee denies the trust and prolongs the litigation, as in this case, it is proper to compute the interest without annual rests or compounding the same. *Idem.*

**MUNICIPAL CORPORATIONS.**

**Counties: Board proceedings: Adjournment of board.** Where the minutes of a board of supervisors at the time of its regular session appear of record for successive days, the fact that at the close of each day's session the auditor appended to the minutes "Board Adjourned" did not destroy the continuance of that particular session; as the word adjourned may mean to take a recess from day to day, or for an indefinite period. *Hoyt v. Brown*, 324.

**Defective sidewalks: Contributory negligence.** A pedestrian using a defective sidewalk which he knew, or as an ordinarily cautious person, ought to have known, was imprudent to pass over, and who might at the same time have taken another way equally convenient, was guilty of such negligence as will defeat recovery for an injury caused by the defective condition of the walk. *Gibson v. City of Dennison*, 320.

**Passage of ordinances: Injunction.** The court will not interfere by injunction to prohibit the passage of a municipal ordinance, even though alleged to be unconstitutional and void; but it may and will prevent the enforcement of an existing ordinance upon a showing that otherwise irreparable injury would follow. Thus the passage of an ordinance prohibiting and punishing the running of Sunday theaters, in its nature an exercise of police power, will not be enjoined; for if void for any reason the courts will not enforce it, and no irreparable injury could follow its passage. *Majestic Theater Co. v. Cedar Rapids*, 219.

**MURDER.** See CRIMINAL LAW.

**NEGLECT.** See BAILMENTS—CARRIERS—RAILROADS.

**Master and servant: Assumption of risk.** An employee having no knowledge of the defective and dangerous character of a machine with which he is at work, and who is given no warning or instruction as to how to do his work, does not assume the risk of injury incident to a defect in the machine. *Murphy v. Bettendorf Wheel Co.*, 249.

**Same: Duty of employee: Contributory negligence.** It is the

## NEGLIGENCE Continued

duty of an employee to obey the orders of his master, and in so doing he may assume that he will not be directed to work in an unsafe place; and if injured in consequence of obeying an improper order he will not be guilty of contributory negligence as a matter of law, unless the dangers of the place were so obvious that no prudent person in a like situation would undertake it, even if so ordered. In the instant case plaintiff was injured by the accidental dropping of a defective hammer, and it is held that as his superior was in charge of the operation of the hammer and directed plaintiff to perform the work, the dangers of which he was not aware, he was not negligent as a matter of law. *Idem.*

**Master and servant: Relationship: Negligence: Liability.** A servant may be in the general employ of one person and at the same time be employed in a particular capacity for another without being an employee of the latter; and whether he is the servant of the one or the other in doing a particular act depends on which has the right to direct or control him in the performance of the act. In this action for a personal injury to a pedestrian it appeared that the defendant employed a man and team to haul lumber, paying a certain price per day for the services of both, which was divided equally between the owner of the team and the driver. The defendant furnished the wagon but exercised no control over the driver or outfit except to direct the delivery of lumber from one place to another: *Held*, that the driver was not an employee of the defendant so as to render it liable for injury to the pedestrian through the negligent handling of the team by the driver. *Ash v. Lumber Co.*, 523.

**Same: Negligence of servant: Liability of master.** The master is responsible to strangers for the negligent acts or omissions of his servant, done in the course of his employment, but if the servant is acting for himself or another the master is not liable. *Idem.*

**Same: Evidence.** In this action for injury to a pedestrian by a runaway team, the evidence is held to present a question for the jury as to whether the driver was negligent in leaving the team untied while unloading lumber, and in doing which the team was frightened by a plank falling upon one of the horses. *Idem.*

**Same: Negligence of driver of team: Liability.** The owner of a team is responsible for the negligent conduct of the driver, where the team and driver have been let to another to do cer-

## NEGLIGENCE Continued

tain work, in the performance of which the driver, in the management of the team, is not under the direction of the hirer. *Idem.*

**Same: Negligence of employees: Evidence.** The evidence in this action is held insufficient to show negligence on the part of the employees of the defendant lumber company while assisting the driver of the team in unloading lumber. *Idem.*

**Master and servant: Machinery guards: Statute: Sufficiency.** The purpose of the statute requiring machinery to be guarded so as to protect the operators or those coming in contact therewith contemplates such means of protection as will reasonably accomplish the purpose, without unreasonably interfering with the efficiency of the machine. In this case it is held that the guard placed over a belt operating the machine and set in cleats in the floor, which could be easily toppled over from the side nearest the machine was not improper, unless from the customary use of the machine it was likely to be toppled over. *Miller v. Sash & Door Co.*, 735.

**Same: Unguarded machinery: Evidence.** In this action the questions of whether the plaintiff operated the machine in the usual and customary manner, or in a way the master should have anticipated when guarding the same; and whether the guard might have been constructed so that it would not have toppled over when the machine was operated as the plaintiff did operate it, without unreasonably interfering with its usefulness, were for the jury; and the evidence is held to support a finding that the guard was improper. *Idem.*

**Same: Contributory negligence: Proximate cause.** Even though plaintiff's negligence in operating the machine may have been the proximate cause of his injury, yet as it was concurrent with that of defendant in failing to properly guard the machine, that fact would not relieve defendant from liability for the injury. *Idem.*

**Same: Evidence.** In this action there was evidence that plaintiff did not know that the belt guard of the machine with which he was at work would turn and allow his foot, with which he operated the power lever, to slip into the belt, and he was not therefore negligent as a matter of law in thus operating the machine. *Idem.*

**Same: Instructions.** Although the court told the jury generally in one instruction that for plaintiff to recover he must establish by the greater weight of the evidence that defendant was guilty of negligence which caused his injury, failure of the court in that paragraph to limit the negligence to the grounds specified in

## NEGLECTANCE Continued

the petition was not erroneous where the same were clearly stated in defining the issues, thereafter separately and specifically submitted, and there was no evidence of negligence except as charged. *Idem.*

**Same.** An instruction that if the machine guard was of such character that defendant would not be negligent in providing the same, when in the exercise of reasonable care for the safety of his employees, he would not be liable for plaintiff's injury thereby, being of a negative character, was not prejudicial even if imposing on defendant too high a degree of care. *Idem.*

**Same: Assumption of risk: Instructions.** Failure of the court in its instructions on assumption of risk to refer to such risks as are incident to the employment was not erroneous, where the only risks alluded to in the evidence were those charged in the petition and shown to have been known to the defendant but not to the plaintiff. *Idem.*

**Injury to sectionman: Submission of issues.** In this action for injury to a section hand by being thrown from a handcar, the evidence is held to justify submission of the issues of the foreman's negligence in placing plaintiff in a dangerous position; in the use of a sail for propelling the car, in view of the condition of the track and velocity of the wind; and in failing to control the speed of the car by means of the brake. *Lehman v. Railway Co.*, 118.

**Same: Proximate cause: Evidence.** Where an efficient cause of an accident is shown a presumption arises that it was produced in that manner, in the absence of a showing that it was otherwise produced, even though some independent agency may have contributed to the result. Thus where a sectionman was injured by the derailment of a handcar through the negligent use of a sail to propel the same, the jury was justified in finding such to be the cause of the accident although the presence of a stick upon one of the rails may have contributed thereto. *Idem.*

**Same: Excessive damages.** A verdict of \$4,500, for permanent injury to the limb of a sectionman 19 years of age, earning \$1.40 per day, is held not excessive. *Idem.*

**Proximate cause: Evidence.** In this action for damages on the ground of injury to the health of plaintiff's intestate, who was afflicted with tuberculosis, the evidence is held insufficient to show that flooding of the premises as claimed aggravated the

## NEGLIGENCE Continued

TO

## NEGOTIABLE INSTRUMENTS

disease and caused decedent increased pain and suffering. *Fleming v. Railway Co.*, 386.

**Sale of explosives: Sufficiency of pleading.** Allegations that defendant sold plaintiff's wife, as kerosene, a dangerous mixture, which in fact contained a large percentum of gasoline, after notice of its dangerous character, and failure to have it examined by an expert, were sufficient to charge actionable negligence; especially as it had been so regarded by the parties without objection on that ground through two trials of the case. *Chapman v. Pfaar*, 20.

**Same: Instructions.** It is the duty of a dealer in kerosene oil, upon receiving notice that would lead a reasonably prudent person to think that it was not of the required test, but contained an explosive substance in dangerous quantities, to make such an examination and test as a reasonably prudent dealer would make under such circumstances, using the knowledge and appliances of such a person in making the test. And the instructions in this case fairly state the rule. *Idem.*

**Same.** In determining the question of negligence in the sale of oil as kerosene, which in fact contains a dangerous percentage of gasoline, the fact that it contained gasoline, that injury resulted from the use thereof, and that an examination by an expert inspector might have revealed its true character, are proper matters for the consideration of the jury. And the question of whether defendant, after notice of the dangerous character of the oil, took all the precautions that could reasonably be required of him was for the jury. *Idem.*

**Same: Damages: Loss of wife and minor children.** There is no fixed rule by which to measure the damages resulting from loss of services, the negligent death of minor children, and the loss of society of a husband or wife, but it is a matter largely in the discretion of the jury. In the instant case the sums allowed are not so excessive as to indicate passion and prejudice. *Idem.*

## NEGOTIABLE INSTRUMENTS.

**Maturity: Waiver: Evidence.** A note payable at a fixed date and containing a provision that the payee may at his option declare the full amount due for nonpayment of interest does not become absolutely due for failure to pay interest at its maturity, but the default in that respect may be waived by subsequent acceptance of the delinquent interest. Some affirmative action

NEGOTIABLE INSTRUMENTS Continued · TO

NEW TRIAL

on the part of the holder showing an intention to take advantage of the option must be taken to make the provision effective. In the instant case the evidence is held to show a waiver of the maker's default in payment of interest. *Farmer's & Merchant's Bank v. Daiker*, 484.

**NEW TRIAL.** See CRIMINAL LAW.

**Inadequacy of verdict: Who may complain.** The fact that the jury did not allow defendant on his counterclaim as much as he was entitled to under the instructions and the evidence is not a matter which the plaintiff can urge in support of a motion for new trial, on the theory that the verdict returned indicated prejudice and passion. *Bell v. Kerns*, 62.

**Misconduct in argument.** Misstatement of the record by the prosecuting attorney in argument is without prejudice, where, as in this case, the evidence was limited to proof of the fact that defendant was at the place of the larceny and shortly thereafter had possession of the stolen property. *State v. Hayward*, 263.

**Misconduct in argument: Sufficiency of record.** Incorporation in the recitals of a motion for new trial of alleged improper argument of counsel is not sufficient to make the language a matter of record as a basis for exception thereto; but where objection to language was made during the argument and the particular language was recited into the record with the objection, a sufficient record to show the ground of objection and the particular language objected to was made. *Swanson v. Railway Co.*, 78.

**Newly discovered evidence.** An application for new trial on the ground of newly discovered evidence made after expiration of the three days should be by petition, and should be supported by evidence and not merely by affidavits, as where a motion for new trial is made within the three days. *Heim v. Resell*, 356.

**Same: Diligence: Evidence.** In a proceeding on petition for new trial on the ground of newly discovered evidence, the petitioner must show diligence in seeking to discover and procure the same: And where it appeared that the necessity of the evidence was as apparent upon the trial as afterward, that the witnesses were convenient, and the party made no attempt to procure their attendance or to procure a suspension or continuance of the trial for that purpose, such a showing of diligence as will support the application was not made. *Idem*.

## NEW TRIAL Continued

**Newly discovered evidence.** In this action to establish a gift of stock certificates the newly discovered evidence of two witnesses who would testify to declarations of the donor, other than those testified to on the trial, to the effect that the donor had given the stock to the plaintiff was not cumulative, and required the granting of a new trial, a sufficient showing of diligence having been made. *Smith v. Meeker*, 655.

**Newly discovered evidence.** Where a party acquires knowledge of material testimony during the trial and fails to ask for time and opportunity to procure it, he is not entitled to a new trial on the ground that it was newly discovered; especially if no affidavit of the witness whose testimony was claimed to be newly discovered was attached to the motion and no reason was given for not doing so. *Sevening v. Smith*, 639.

**Amendment of petition.** An amendment to a petition for a new trial may be made after the time for filing the petition has expired, provided no new grounds for a new trial are set up. In this case the allegations of the petition were insufficient to authorize a new trial on the ground of newly discovered evidence, but did in effect allege that a new witness could be produced, and an amendment more clearly negating lack of negligence in discovering the witness was properly allowed, though filed after the year for filing the petition had expired. *Guth v. Bell*, 511.

**Newly discovered evidence: Materiality.** In this action for the value of hogs purchased of plaintiff the defendant alleged a breach of warranty on the part of plaintiff to the effect that the hogs were not unloaded while in transit, which plaintiff testified to on the trial, and defendant undertook to show that they had been so unloaded and that he told plaintiff that he would not buy them if they had been unloaded at a certain yard, for fear that they had contracted cholera. *Held*, that newly discovered evidence of the trainmaster that the hogs were unloaded at the designated intermediate yard, and the evidence given by plaintiff in another action between other parties contradicting his evidence in this case on the subject, was material on the question of breach of the warranty, regardless of whether the answer sufficiently raised that question. *Idem*.

**Newly discovered evidence: Materiality.** In this action the defendant filed a petition for new trial on the ground of newly discovered evidence, consisting of evidence inconsistent with that of plaintiff given at the trial and his evidence on the same subject in another action between himself and other defendants in this, that in this action he stated that the hogs in question were

**NEW TRIAL Continued**

shipped in a car with other fat hogs to be sold at an intermediate market, and that after the fat hogs were unloaded at that market the car was taken to a point outside the stockyards and the hogs intended for defendant were loaded directly from the car into another car in which they were delivered to defendant. In the other action plaintiff testified that after the fat hogs were removed from the car he knew nothing about what was done with the car and was not present when the defendant's hogs were transferred to the car in which they were carried to their destination. *Held*, that plaintiff's evidence in the two cases was entirely inconsistent, making his evidence in the latter action newly discovered evidence on the question of whether the hogs were unloaded at the intermediate point. *Idem*.

**False testimony.** That a judgment was procured by false testimony is not ground for the granting of a new trial upon petition filed within one year: So that plaintiff's testimony in the suit with other parties, showing that his evidence in this case was false if the other was true, did not support the petition for new trial. *Idem*.

**Newly discovered evidence.** Newly discovered evidence is ground for a new trial which may be presented by petition filed within one year; and such evidence may consist of admissions of the party made against his interest and discovered subsequent to the trial, whether made before or after the trial, provided they were made before the expiration of the time for filing a petition for new trial. *Idem*.

**Same.** The records of the stockyards offered in support of the petition for a new trial, showing that the hogs in question were unloaded at the intermediate station into a certain pen in the yards and reloaded into another car from the same pen, was material and competent evidence tending to contradict the testimony of plaintiff that they were not unloaded at that place, which would be available to the defendant on a retrial of the case, and was sufficient as newly discovered evidence to sustain the petition. *Idem*.

**Diligence.** On the question of diligence in procuring the evidence, plaintiff's testimony that he saw the custodian of the stockyard's records prior to the trial and was told by him that he had no recollection of the transaction, and that plaintiff did not learn of the existence of the records until after the trial of another case involving the same, was a sufficient showing of diligence. *Idem*.

**Cumulative evidence.** The evidence afforded by the stockyards

**NEW TRIAL Continued**

records of the unloading of the hogs was of a different kind and of a distinctly different probative character from that of a salesman of the commission firm who handled the fat hogs, who testified that the hogs in question were unloaded at the yards, and was not cumulative merely: So that refusal to grant the petition for new trial because of the cumulative character of the evidence was erroneous. *Idem.*

**New trial on petition: Fraud.** The plaintiff in this action claimed to have purchased the undivided interests of all the heirs in certain real estate of a decedent prior to a partition sale of the same, but after decree, and instituted action for specific performance of the contract, making the purchaser at the partition sale a party. The heirs assured the purchaser that the suit was not in good faith and that they would defend it and he entered no defense thereto. Some of the heirs made defense and default was entered against others and the purchaser, but later the decree against the heirs only was set aside. Plaintiff failed to prove his case but entered into a secret agreement with the heirs for a sale of the land to him and decree was entered based upon this contract. *Held*, that the default against the purchaser was of no avail to the plaintiff, as he was not entitled to any relief against him; that the decree was a legal fraud on him and he was entitled to a new trial on petition. *Skvor v. Weis*, 720.

**Same: Negligence of petitioner.** It is also held that the purchaser at the partition sale was not negligent in permitting default to be taken against him; and that as plaintiff is bound by the allegations of his petition, which did not warrant the decree entered against the purchaser he can not avail himself of such claimed neglect. *Idem.*

**Same.** Nor did the fact that, subsequent to the default of the purchaser and decree against him, the plaintiff filed an amendment alleging that the defendant heirs had no further right to defend, because the purchaser had acquired their title and plaintiff had obtained an adjudication against him, tend in any manner to aid the plaintiff; but the subsequent decree based in part upon the amendment rather emphasized the wrong done. And the two decrees against the purchaser, in view of their provisions and the method by which they were obtained, constitute in effect but one adjudication and a legal fraud against which the purchaser is entitled to relief by way of a new trial on the merits of the case. *Idem.*

**Remarks of court.** Where no exception is taken to remarks of the court during the progress of the trial they can not be made the basis of error on appeal. *Payne v. Railway Co.*, 445.

NOTICE

TO

PRACTICE

**NOTICE.** See CONVEYANCES—TAXATION.**NUISANCE.** See INTOXICATING LIQUORS.**PARENT AND CHILD.**

**Right to custody: Evidence.** A father has the primary right to and should be given the custody of his minor children as against all persons except the mother, unless he has waived or forfeited that right, or is an unsuitable person. In this action the evidence is insufficient to show that the father acquiesced in the guardianship of his minor children by a relative of his wife, from whom he was divorced and with whom the children were living prior to her death; or that he was an unsuitable person to be intrusted with their care. *Brem v. Swander*, 669.

**PARTNERSHIP.**

**Identity of partners: When immaterial.** Where no personal judgment is sought against any individual partner the question of whether a certain person is a member of the firm is immaterial; and a failure to identify him as a partner will not preclude recovery against the partnership. *Richards v. Hellen*, 66.

**Same: Denial of partnership.** In replevin based on a partnership contract defendants can not deny the fact of partnership; and where the petition charging a partnership is not denied, as required by statute, the plaintiff is not called upon to prove that any particular person is a member of the partnership. *Idem*.

**PERJURY.** See CRIMINAL LAW.**POOR PERSONS.**

**Support of transient poor: Liability of officers.** The liability of a county or its officials for relief of the poor is purely statutory; and as there is no statute creating a liability on the part of the county for failure to furnish proper relief to a transient poor person, a supervisor and overseer of the poor is not personally liable for such failure. *Wood v. Boone County*, 92.

**Same: Governmental duties: Liability.** The furnishing of aid to the poor is a governmental function, and generally neither the state nor its instrumentalities are liable for the performance of such duty. *Idem*.

**PRACTICE.** See APPEAL—CRIMINAL LAW.**Continuance: Absent witnesses: Diligence: Evidence.** An

## PRACTICE Continued

to

## RAILWAYS

application for a continuance because of inability to procure witnesses must disclose a diligent effort to have them present at the trial, otherwise it should not be granted. Evidence of diligence held insufficient. *State v. Hayward*, 265.

**Continuance in equitable cases: Depositions.** The defendant in an equitable action who appears at the appearance term and files a general denial does not have the absolute right, at a subsequent term, to elect to take his evidence by deposition and demand a continuance for that purpose without any showing of meritorious grounds therefor; and the fact that the appearance term continued practically until the trial term began was not important on this question of continuance, in the absence of such showing. *Wahlberg v. Lumber Co.*, 618.

**Court findings: Force and effect.** The findings of the trial court in probate proceedings are entitled to the force of a verdict of a jury, if substantially supported by the evidence. *Brem v. Swander*, 669.

**Special interrogatories.** Special interrogatories should call for a finding upon ultimate facts. So that where the pivotal question was whether the proximity of the plaintiff to the street car track was observable to the motorman in time for him to have avoided the accident by the exercise of reasonable care, interrogatories regarding the actions of the horse drawing the vehicle in which plaintiff was riding, which were practically undisputed, did not call for ultimate facts and were properly refused. *Payne v. Railway Co.*, 445.

**Trial: Verdict: Coercion by court.** Where the jury reported to the court that it had not yet reached an agreement and that the question on which it was divided was one of fact, it was not improper for the court, in ordering them to again retire for further deliberation, to suggest the desirability of their agreeing upon a verdict, and had no tendency to coerce a verdict not the deliberate judgment of the jury. *Parks v. Town of Laurens*, 567.

**Trial: Withdrawal of causes of action.** Counts of a petition which are unsupported by evidence should be withdrawn from the consideration of the jury. *Dunlap & Co. v. Anderson*, 488.

**RAILWAYS.** See CARRIERS.

**Crossing accident: Negligence: Evidence.** In this action for the death of an interurban conductor by a collision at a crossing of defendant's track, the evidence of negligence on the part of

## RAILWAYS Continued

defendant's engineer is such as to require a submission of that question to the jury. *Grace v. Railway Co.*, 418.

**Same: Duty to keep a lookout.** Although a steam railway train is entitled to precedence on approaching an interurban crossing, and the employees of the interurban company are bound to keep a lookout for approaching trains, yet that fact will not justify the trainmen of the steam railway in assuming that the crossing is not a place of danger; but they are nevertheless required to keep a lookout to ascertain whether the crossing is in use by the interurban company when approaching it. *Idem.*

**Same: Instructions: Applicability to issues.** Where the failure of the engineer of a steam railway train to stop, as required by statute on approaching the crossing of another like railroad was not alleged as a ground of negligence, and the court in its instructions made no reference to the subject, a requested instruction that the interurban railway, although at the time operating a train by a steam engine, was not a steam railway within the meaning of the statute requiring their trains to stop on approaching a crossing, was not within the issues and properly refused. *Idem.*

**Same: Evidence: Harmless error.** Where there was nothing in the evidence justifying a finding of negligence because of defendant's failure to stop its train on approaching the interurban crossing, admission in evidence of the articles of incorporation of the interurban railway, on the theory that they tended to prove that the railway might be operated in part by steam power, was not prejudicial. *Idem.*

**Same: Crossing agreement: Contributory negligence.** A provision in the crossing agreement between the two companies that the interurban company on approaching the derailing switch should stop its cars and the conductor should proceed ahead and flag his car across, did not relieve the defendant from the duty of exercising care to avoid injuring the interurban employees on their train at the crossing; and where the rules of the interurban company authorized the flagging to be done by a brakeman instead of the conductor, and the injury to the conductor was not the result of the flagging operation, negligence of the conductor could not be predicated on the fact that he ordered the brakeman to flag his train across instead of doing it himself. *Idem.*

**Same.** Where a brakeman on an interurban train had read and knew the rules of the company, as to stopping and flagging the

## RAILWAYS Continued

train over a crossing, and was in no sense an employee of the conductor, but a fellow servant for whose negligence the conductor was not responsible, and there was no evidence that the brakeman failed to perform his duty in flagging the train across, the fact that the conductor failed to instruct the brakeman as to the method of flagging and the dangers to be apprehended from an approaching engine on defendant's track, was not such negligence on his part as to preclude recovery for his injury and death. *Idem.*

**Same: Fellow servants: Imputed negligence.** A brakeman employed by a railway company is not the servant or personal representative of the conductor of the train with respect to the conductor's safety, and they are not so related in the discharge of their duties that the negligence of one will be imputed to the other. *Idem.*

**Same: Degree of care: Instruction.** Where an exercise of a high degree of care by decedent would not have averted the accident, the defendant was not prejudiced by an instruction that decedent was required to exercise reasonable care for his own safety rather than a high degree of care demanded by the circumstances. *Idem.*

**Private crossings: Waiver of evidence.** On the question of whether plaintiff waived his right to a private crossing protected by cattleguards and gates by asking for two crossings, which were constructed without guards, the evidence is in conflict and such that the issue was properly submitted to the jury. *Swanson v. Railway Co.*, 78.

**Depot platforms: Negligence: Evidence.** A railway company must anticipate the use of its walks and depot platforms by passengers while waiting for the arrival of trains, and must take reasonable care that they shall not be injured from defects therein while so using them. In the instant case plaintiff was injured by walking off an unrailed platform at night, and it is held that defendant's negligence in failing to have the platform lighted was for the jury. *Drummy v. Railway Co.*, 479.

**Same: Contributory negligence.** In the instant case it is held that plaintiff was not negligent as a matter of law in using an unlighted platform for a proper purpose. *Idem.*

**Same: Statute: Effect.** A statute requiring railway companies to have their stations furnished, heated and lighted for the accommodation of passengers for a stated time before and after the arrival of trains, does not relieve them of the common law

## RAILWAYS Continued

duty of using reasonable care for the protection of persons rightfully upon the premises in connection with the transaction of its business. *Idem*.

**Shipment of live stock: Negligent delay.** A railway company is not required to attach a freight car carrying live stock to a passenger train to hasten its delivery; and where it transports the same by its usual freight trains on schedule time and there is no evidence that there were faster freight trains by which the destination could have been sooner reached, it is not liable for the death of an animal, the result of sickness, while in transit. *Pine Bros. v. Railway Co.* 1.

**Street railways: Injury to passenger: Negligence of motorman: Evidence.** In crossing a railroad track the motorman is bound to exercise the highest degree of care for the safety of his passengers, and he is not relieved of this duty merely because a flagman is stationed at the crossing. In this action for injury by collision with a railway train the evidence of the motorman's negligence is such as to require submission of that question to the jury. *Parker v. Railway Co.*, 254.

**Same.** The mere fact that the railway company may also have been negligent will not relieve the street car company from the consequences of its negligence. *Idem*.

**Same: Crossing accident: Negligence: Instruction.** It is the duty of a street car motorman upon approaching a steam railway crossing to take the highest precaution for the discovery of an approaching train, which doubtless includes the duty of stopping his car for that purpose. But having once brought his car under control and stopped the same on approaching the crossing it was not negligence, as matter of law, for him to obey a flagman's signal and proceed over the railroad track without again stopping to look for a train. Under such circumstances the question of his negligence is one of fact. *Idem*.

**Street railways: Care in operation of cars.** A street railway company does not have the exclusive right to its part of the street but must exercise a constant lookout for a clear track and keep its cars under reasonable control. *Payne v. Railway Co.*, 445.

**Same: Proximate cause.** Where negligence of the company in the operation of a car is shown, the question of whether the fright of a horse and its swerving upon the track in front of the car was an independent proximate cause of the accident, or merely a contributing cause, is for the jury. *Idem*.

**RAILWAYS Continued**

**Same: Evidence: Warning of danger.** The testimony of plaintiff in this action, as to warning the driver of the vehicle in which he was riding, of the danger to be apprehended from the approaching car, and indicating care on his part, was admissible for that purpose. *Idem.*

**Speed of street car.** It is not necessary that a witness be an expert to testify to the rate of speed of a street car, nor need he give his opinion of the number of miles per hour the car traveled. In the instant case the evidence should have been received, but in view of the entire record its exclusion was not prejudicial. *Idem.*

**Street railways: Injury to passenger: Negligence: Evidence.** In this action for injuries to a passenger while attempting to board a street car, the evidence of negligence on the part of the conductor in signaling the car to start before plaintiff had reached a place of safety; that he stopped plaintiff from entering the car while in a place of danger; and that he was in a position where he might have assisted plaintiff to a place of safety, was such as to require a submission of each charge of negligence and to support a verdict for plaintiff. *Boice v. Railway Co.*, 472.

**Same: Negligence.** The rule that a mere mistake or error of judgment on the part of one required to act in an emergency will relieve him from the charge of negligence, applies to the conduct of the one who is put in peril and not to one whose duty it is to avoid injury to another. Thus where plaintiff was attempting to board a street car by the passageway intended for egress, and the conductor, who was in no position of peril, told plaintiff to wait a minute while she was on the first step of the car, and after he had signaled the car to start, there was no emergency relieving him from the charge of negligence, if he failed to exercise reasonable care to assist plaintiff to a place of safety. *Idem.*

**Same: Reasonable care: Instructions.** Where the court instructed that the conductor was required to use the highest degree of care consistent with the practical operation of his car to avoid injuring a passenger, but that such degree of care was not required in case the passenger was attempting to board the car in such manner that he was not aware, or in the exercise of reasonable care would not have been aware of his intention to do so, failure to further define the degree of care required in rendering assistance to a passenger when discovered in a place of danger was not prejudicial. *Idem.*

**Same: Evidence: Conclusion.** The testimony of plaintiff that

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TO

REAL PROPERTY

if the conductor had not asked her to wait a minute while attempting to board the car she could have reached a place of safety before the car started, was not objectionable as a conclusion, since the conclusion could only be drawn from a knowledge of all the attendant facts and circumstances. *Idem.*

**RAPE.** See CRIMINAL LAW.

## REAL PROPERTY.

**Adverse possession: Application of doctrine.** The doctrine of adverse possession can not be invoked against the state or any of its instrumentalities so as to prevent the exercise of proper governmental functions; although the doctrine will operate in favor of a municipality and give it title or right to the use of ground as a street or alley. *Johnson v. City of Shenandoah*, 493.

**Same: Acquiescence: Boundaries.** The boundaries of streets and alleys as between the public and private owners can not be established by acquiescence; but the intervention of a street or alley between the premises of private owners does not affect the question of acquiescence as between them. *Idem.*

**Same: Boundaries: Estoppel.** While a private individual is not entitled to an injunction restraining a municipality from changing the boundaries of a street or alley on the ground of adverse possession or acquiescence, still he may rely upon an equitable estoppel as against the right of the municipality to claim that the boundary is at a different place than that at which the abutting owners have acknowledged it to be, when the estoppel rests upon the erection of valuable and permanent improvements with reference to the lines as claimed by the abutting owners, who would suffer injury if compelled to remove the same. *Idem.*

**Specific performance: Mutuality of contract.** An executed contract for the sale and purchase of real estate, by which one party agrees to sell and the other to buy at a stipulated price and terms of payment, is not lacking in mutuality and may be specifically enforced. *Burge v. Gough*, 183.

**Same. Unconscionable contract.** The mere fact that after the execution of a contract for the sale of land there was a material increase in its value does not render the contract unconscionable so as to prevent specific performance; especially where the price agreed upon was fair at the time of making the contract. *Idem.*

**Same.** While courts of equity sometimes refuse specific perform-

## REAL PROPERTY Continued

TO

## REPLEVIN

ance of valid contracts, leaving the complainant to his legal remedy, in this action nothing is shown justifying a refusal of the relief asked. *Idem.*

**Sale of option contract.** An optional contract for the purchase of real estate which is of value may be sold and assigned by order of court for the benefit of the creditors of an insolvent estate, although it may not ordinarily be sold by the party to whom it was originally given: So that in this receivership proceeding the court had power to order the sale of an option to purchase property made in connection with a lease of the same by the insolvent. *Blank v. Independent Ice Co.*, 241.

**REFORMATION OF INSTRUMENTS.** See EQUITY.

**REPLEVIN.**

**Necessity of demand.** Where there was a consummated gift of corporate stock during the life of the donor and the administrator of his estate obtained possession of the same from the corporation to which it had been sent for a transfer on its books, and without the knowledge or consent of the donee, such possession was wrongful and demand therefor was not necessary to maintain replevin of the stock. *Smith v. Meeker*, 655.

**Counterclaim.** A counterclaim can not be pleaded to an action of replevin and when so pleaded should be stricken on motion. Moreover the counterclaim pleaded in this case was based on a failure of consideration predicated on a claim for nondelivery of property not described in any contract under which the property replevined was shown to have been sold, and was therefore insufficient and was properly stricken. *Richards v. Hellen*, 66.

**Same: Allegations of title: Variance.** An allegation by the plaintiff in an action of replevin that he is the absolute and unqualified owner of the property will not preclude his recovery under proof of a conditional and qualified ownership, where he has also pleaded the exact nature of his title, which is in conformity with the proof. *Idem.*

**Same: Nature of action.** The action of replevin involves the right simply to possession of the property at the time the action is brought; and this right is not dependent solely upon ownership, as the action may be maintained even against the true owner. *Idem.*

**Same: Condition precedent.** Where a contract for the sale of property provided for a retention of the title in the seller until

**REPLEVIN Continued**

TO

**SCHOOLS**

payment of the price, with a right to possession on default, and contained no provision for a return of that part of the price already paid as a condition precedent to the right to retake possession on default, the seller has such a present right of possession as will entitle him to bring an action of replevin without tendering back that part of the price paid. *Idem.*

**Same: Liability of delivery bond: Value of property.** Where the plaintiff in replevin, on an entry of judgment in his favor, elects to have a return of the property and secures execution for that purpose which is returned unsatisfied because of a destruction of the property, he is then entitled to judgment against the sureties on defendant's delivery bond, providing for its return, for the value of the property at the time of the commencement of the action. *Idem.*

**Same: Judgment: Value of plaintiff's interest in the property.** Although the court in rendering judgment on the bond in this case failed to find the value of plaintiff's interest in the property, still defendants, having conceded that it was to be as much as the recovery, can not complain of the judgment rendered. *Idem.*

**SALES.**

**Breach of warranty: Executory contract of sale.** The purchaser of goods with a warranty may retain the goods and sue for breach of the warranty; but where the goods are delivered on an executory contract as to quality, the absence or presence of which can be seen on inspection, the purchase is without warranty, and acceptance without objection relieves the seller of all responsibility as to quality: As where postal cards were ordered to be manufactured, and it was stated by the salesman that they would be of the quality of a card exhibited to the purchaser but made by another. The purchaser received and sold a large part of the cards without objection. *Held*, that the contract of sale was by description rather than by sample and that failure to make objection precluded the right to damages because of failure to correspond in quality with the card exhibited. *Minn. Selling Co. v. Cowin & Co., 129.*

**SCHOOLS.**

**Organization: Description of territory: Petition.** Petitions for the organization of a school district describing the proposed new district as comprising all of an incorporated town and the school corporation of the town, subdistricts and independent districts

## SCHOOLS Continued

## TO

## STATUTES

were sufficient, under the provisions of Code Supp. 2794, providing for the organization of an independent district consisting of contiguous territory, to include not only the territory of the incorporated town but also that of the independent district in which the town was situated. *School Dist. v. School Dist.*, 598.

**Same: Notice of election.** Notice of an election pursuant to such petitions describing the territory as including all of the incorporated town, independent districts and subdistricts, all contiguous territory to the independent district of the town, was a sufficient notice of an election to vote on the proposition to create an independent district comprising the original independent district and adjacent territory. *Idem.*

**Same: Ballot.** The ballot used in this case is held to sufficiently describe the territory so as to include the original independent district as well as contiguous territory. *Idem.*

**Same: Notice of election: Posting: Presumption.** Where there is nothing in the evidence to show that a sufficient number of election notices were not posted in the territory proposed to be organized into a school district the court will presume on appeal that this was done. *Idem.*

**Same: Notices of election: Sufficiency.** Where the notices of election were signed by the members of the board to whom the petition for the organization of an independent district was presented, it was sufficient without certification by the secretary of the board; so that the addition of the name of one purporting to act as secretary, but not such in fact, did not render the notices void. *Idem.*

**Same: Elections: Polling places.** The fact that separate elections were held in each of the territorial divisions proposed to be consolidated instead of a single election in the district to which the petition was presented, as contemplated by statute, did not invalidate the organization of the district, where it appeared that a majority of all the electors so voting were in favor of the organization; in the absence of any showing of fraud or that the result would have been different had the ballots all been cast at a common voting place. *Idem.*

**SPECIAL INTERROGATORIES.** See PRACTICE.

**STATUTES.** See CARRIERS—COURTS—INTOXICATING LIQUORS—RAILROADS.

**Construction.** In all cases involving statutory construction the

**STATUTES Continued**

court will look not only to the particular provision under consideration but to the entire statute, on the assumption that each word and provision has been used for an intelligent purpose; and it is always proper and frequently necessary to consider other related statutes, especially those in existence when the one under consideration was enacted. *Conly v. Dilley*, 677.

**Enactment: Legislative record: Presumption.** The court will not presume that an amendment to a bill pending before the general assembly was adopted and became part of the law as enacted, simply on the strength of the fact that it was favorably reported by a committee of one branch of the assembly; but the reasonable presumption, arising from the fact that the bill as finally passed, enrolled and approved by the Governor did not contain the amendment is that the same was rejected, the legislative journal being silent as to its disposition subsequent to the report of the committee. *Idem*.

**Constitutional law: Construction.** Laws of a general nature must be uniform in their operation and contain no grant of special privilege or immunity to any citizen or class of citizens; but they must also be clearly and palpably in violation of the constitution to render them invalid in such respects. The mere fact that a statute is limited to comparatively few persons in its operation, if the classification is substantial and reasonable, is not sufficient to condemn it. *State v. Fairmont Creamery Co.*, 702.

**Same: Uniform operation: Classification.** A classification of subjects of legislation must be based upon a reasonable and substantial distinction, which differentiates one class from another, so as to suggest the necessity of different legislation as to such classes; and in determining the reasonableness of a statute in this respect courts will take note of matters of common knowledge and report. *Idem*.

**Same.** The constitution announces certain basic principles which must be observed in the enactment of statutes but it will not be given a technical and strained construction to impair the efficiency of the legislature in dealing with problems affecting the public welfare, such as unfair competition. And where a statute is directed against a particular evil of that character, it will not for that reason alone be regarded as arbitrary in its classification. Thus the Act of the Thirty-third general Assembly providing that the buying of milk, cream or butter fat for manufacture, or of poultry, eggs and grain for storage, shall be considered unlawful discrimination and shall be punished, when car-

## STATUTES CONTINUED

TO

## TAXATION

ried on for the purpose of destroying the business of a competitor by paying more for such commodities in one locality than in another, after making an allowance for the difference in quality and cost of transportation, is not in violation of the constitutional provisions relating to uniformity of laws and special privileges, the classification being reasonable and substantial, although the practical operation of the act is limited to comparatively few people. *Idem.*

**Enactment: Sufficiency of title.** It is not necessary that the details of the subject matter of a legislative act be set forth in its title, but if the title gives a fair key to the contents of the act it will be sufficient. In the instant case the title of the original act, of which the one in question is amendatory, described the act as one to prohibit unfair discrimination between different sections, communities or localities, or unfair competition, and provided penalties. The title of the amendatory act referred to the law as it appears in a certain section of the Code, relating to unfair discrimination between different sections, communities or localities, defining the same and providing penalties therefor. The objection to the title of the amendatory act was that it did not contain any indication that the latter act embraced discrimination in commodities not included in the original act. *Held*, that as the act was amendatory its subject as stated in the title was appropriate to the contents of the act and therefore sufficient. *Idem.*

**STATUTE OF FRAUDS.** See CONTRACTS.

**STREET RAILWAYS.** See RAILROADS.

**SUMMARY PROCEEDINGS.** See ATTORNEYS.

## TAXATION.

**Assessment of omitted property: Default: Vacation: Appeal.**

Where a county treasurer has listed alleged omitted property for taxation, and on the day set for hearing and before any steps have been taken to enforce payment of the tax he becomes convinced that the assessment is erroneous, or is informed that the taxpayer is present before him desiring to show cause why the listing and assessment should not be made, he may, even after entry of default, reopen the matter for further hearing. And where the treasurer, as in this case, had gone through the form of entering default, but the taxpayer shortly afterward appeared and offered his objections to the assessment, which were received, filed and considered, the proceeding amounted to a re-

## TAXATION Continued

opening of the matter; and the action of the treasurer in thereafter affirming the assessment constituted a finding from which the taxpayer was entitled to appeal. *Ream, Treas., v. Brown*, 301.

**Collateral inheritance tax: Application of law.** The collateral inheritance tax law contains no retroactive provision, and is therefore not applicable to an interest in property which had vested prior to the time it took effect, even though the interest acquired was subject to contingencies which might affect the future enjoyment thereof. *Morrow, Treasurer, v. Depper*, 341.

**Collateral inheritance tax: Nature of proceeding.** Proceedings relating to collateral inheritance taxes, while special, are at law, and the rules applicable to appeals in law cases govern. *Gould v. Morrow*, 461.

**Same: Trial de novo.** An inheritance tax proceeding is not triable *de novo*, but is at law and reviewable on exceptions, even though it could not be submitted to a jury. *Idem.*

**National bank shares: Value: Deduction of government bonds.** That portion of the capital of a national bank invested in government bonds should be deducted from the bank assets in determining the value of its shares of stock for the purpose of taxation. *Des Moines Nat. Bank v. Des Moines*, 336.

**Omitted property: Notice: Sufficiency.** The notice of a county treasurer of his intention to assess "moneys and credits" as omitted property, and reciting that the same consisted of notes and corporate stock, was sufficient to inform the corporation of an intention to assess corporate stock; especially where the corporation appeared by counsel before the treasurer in response to the notice. *Woodbury County v. Talley*, 28.

**Same: Capital stock: Assessment roll: Description.** Where the entries upon the assessor's book indicated that the capital stock of a trust company had been assessed, the fact that the trust company was the owner of stock in a bank of about the same value, which did not appear to have been assessed, did not warrant the inference that the assessment made was upon the bank stock and not upon the capital stock of the trust company. *Idem.*

**Same: Valuation of property: Fraud.** Where an assessment is for a substantial amount and there is no material disparity between the amount and the actual value of the property fraud will not be imputed to the taxing officers so as to invalidate the assessment. *Idem.*

TAXATION Continued

to

TRUSTS

**Same: Valuation of property.** Where property has once been assessed though at an undervaluation not amounting to fraud it can not be again assessed as omitted property. *Idem.*

**Same: Assessment of capital stock: Evidence.** In this action to review an assessment of omitted property the evidence is held to show that the capital stock of a loan and trust company was not assessed in a particular year. *Idem.*

**Same: Statement by corporation: Effect.** Statements which the statute requires a corporation to furnish an assessor relating to the value and description of its capital stock and real estate are in the nature of admissions, which may be considered by the treasurer in determining whether property of the corporation has been omitted from assessment, whether the same were ever before the assessor or not. *Idem.*

**Same: Assessment by treasurer: Record.** It is essential that the treasurer in assessing omitted property make a record of his action in some form, and this may be done in the manner prescribed for listing omitted property generally, by an entry in the tax list or other book kept for the purpose of evidencing the final determination of the treasurer. *Idem.*

**Same: Valuation of property by treasurer: Review.** The county treasurer alone is clothed with authority to determine the value of omitted property for the purpose of taxation, and no appeal lies from his finding, nor can the amount of his assessment be reviewed by *certiorari*. *Idem.*

**Tax sale: Injunction: Redemption.** Where it appears that a tax sale certificate was purchased and held by another with the knowledge and for the benefit of the landowner, he is not entitled to an injunction restraining the county treasurer from issuing a deed thereunder: And a purchase of the certificate by the owner operates as a redemption from the sale and eliminates further controversy as to the validity of the tax. *Hoyt v. Brown, Treasurer, 324.*

## TRUSTS.

**How created: Parol evidence.** Declarations of trust are required by the statute to be in writing and can not therefore be ingrafted by parol on a deed reciting a fair consideration for the property and containing no provision attaching any trust to the title. *Schurz v. Schurz, 187.*

**Same: Evidence.** A trust can not be orally ingrafted upon a

## TRUSTS Continued

TO

## WARRANTIES

deed which is an absolute and unconditional conveyance of the fee; and even though an oral declaration of trust may be enforced against the party sought to be charged, where he has once recognized its obligation and undertaken its performance, still the evidence of such recognition and performance must be unequivocal. The evidence in this case is insufficient to charge the grantee with a trust resulting from recognition. *Idem.*

## TORTS.

**Joint wrongdoers: Release: Construction.** In this action it appeared that plaintiff settled with certain persons, not parties hereto, but jointly interested in the misappropriation of its funds, and gave them a written release from further liability, which is set out in the opinion; and it is held that the release is unconditional and does not expressly reserve the right to look to others for further misappropriated funds, although reciting that the sum received is to apply on the misappropriated fund. *Farmer's Sav. Bank v. Aldrich*, 144.

**Same: Release of one joint wrongdoer: Application of rule.** The rule relating to the effect of a release of one joint wrongdoer upon the liability of others applies to all cases where one may look to two or more persons charged with a joint wrong, whether growing out of breach of contract or tort. *Idem.*

**Same: Intent of parties: Parol evidence.** The effect of a settlement with one joint wrongdoer is to be determined by the intent of the parties, and this is not dependent solely upon the language of a receipt in connection therewith, but may be shown by parol evidence. In the instant case parol evidence was admissible, as the instrument relied upon as a release of other joint wrongdoers is held to be no more than a receipt. *Idem.*

**Same: Settlement with and release of one wrongdoer: Effect.** Where there is a common liability on the part of two or more wrongdoers and settlement is made with one on consideration of such liability and its extent, the claimant can not, by an express or implied reservation of the right to recover an additional amount from the others on account of the same liability, defeat the effect of the release given the one with whom he settles, but all are released thereby. *Idem.*

**VERDICT.** See DAMAGES.

**WAIVER.** See LANDLORD AND TENANT.

**WARRANTIES.** See SALES.

WILLS.

**WILLS.** See *Conveyances*.—*Part of* *of* *Testaments*.

**Construction: Interest of life tenant.** Under a will bequeathing personal property to a widow for her own personal use and benefit during life, with full power to expend the whole of the personal estate and the income from the realty, with remainder over, there was an absolute gift to the widow of the entire income, and such of the personal estate as had not been disposed of by her at the time of her death. *Quiner v. Braunhausen*, 390.

**Election by widow: Notice.** A widow is not presumed to make her election to take under rather than accept the provisions of the will for her benefit until notice has been served requiring her to elect as provided by the statute. *Albright v. Albright*, 397.

**Mental capacity: Evidence.** The mere fact that a will is unreasonable or unjust in its terms, when taken in connection with evidence of the testator's mental capacity, is not of itself sufficient to avoid it for mental incapacity. *Severing v. Smith*, 639.

**Same.** Mere impairment of the mental faculties from old age or disease will not avoid a will if the testator still retains sufficient mental power to know in a general way the contents of his will, the nature and extent of his estate and his intended disposition of it. *Idem*.

**Same: Burden of proof: Direction of verdict.** The burden of establishing a testator's mental incompetency is upon the contestant of a will, and when giving his evidence the strongest probative force it is clear that a verdict for him should have been set aside by the court, a directed verdict for the contestant is proper. In this case the evidence is held insufficient to invalidate the will on the ground of mental disability. *Idem*.

**Property chargeable with debts.** Under the provisions of a will directing the payment of debts out of the personalty and authorizing the surviving spouse to use and control all remaining property, real and personal, and to sell or mortgage the same, and providing that in case of sale one-third of the proceeds should be paid to a daughter, debts of the estate in excess of the personalty were chargeable against the realty, the daughter's interest attaching only to what remained after payment of debts. *In re Estate of Schmidt*, 635.

**Revival: Republication.** A will which has been expressly revoked may be revived by re-execution or by a codicil legally executed; but when done by codicil an intention to revive the former

## WILLS Continued.

will must be shown, and this may be by any reference therein which makes such intent obvious. The codicil need not be attached to the will to make it operative, but there must be such reference to the will as to furnish the means of identification without other evidence, except to show that the document sought to be incorporated is identical with that referred to in the will. In this case an instrument executed at or about the time of the destruction of a second will which contained an express revocation of the former one, addressed to the judge of the district court, and requesting him to appoint a certain person as administrator without bond, was not sufficient to revive the former will, as there was no showing of an intent to do so. *Blackett v. Ziegler*, 344.

**Same: Presumption as to revival.** The mere destruction of a second will expressly revoking a former one raises no presumption that the former will is revived; that question depends upon the testator's intention, which must be gathered from all the circumstances in the case. *Idem*.

**Same: Cancellation of wills: Statute.** The cancellation of a will as provided by the statute may be by an instrument of cancellation, by the execution of another will containing an express clause of revocation, or by the execution of an inconsistent will without such clause; the term cancellation meaning a revocation by a written instrument. *Idem*.

**Same.** The execution of an instrument of cancellation effects a revocation of the will whether the instrument is probated or not. *Idem*.

**Same.** An implied revocation of a will from the execution of a second inconsistent will does not become effective if the second will is destroyed or revoked before probate. *Idem*.

**Same: Revivor: Evidence.** In this case the testator executed a second will in which she expressly revoked a former one, but subsequently destroyed the second, reserving the first until her death. *Held*, that the first will was revoked by the execution of the second, but the question of revivor of the first one by the destruction of the second was one of intent to be gathered from the admissible parol evidence. And on this question the declarations of the testator at the time of the revocation are admissible. *Idem*.



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